

THE  
HISTORY OF SCOTLAND

FROM AGRICOLA'S INVASION TO THE  
EXTINCTION OF THE LAST  
JACOBITE INSURRECTION

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SECOND EDITION

IN EIGHT VOLUMES

VOL. II.

WILLIAM BLACKWOOD AND SONS  
EDINBURGH AND LONDON  
MDCCCLXXIII



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a slip of parchment. But it is odd that these pedantic reasoners should have overlooked how strongly this transaction bears against them. If the Scots people really were under feudal subjection to the Norman kings of England, what need to create that condition by a hard bargain with a prisoner? Or, supposing that the condition had really been established, and the King of Scots was a rebel, then the phraseology of the documents would have undoubtedly shown as much, and would have renewed or confirmed the past. What the conditions of the Treaty of Falaise do, however, is to create the new condition of vassal and superior from their date. They explain the opportunity, and certify the use it is put to.

We may depend upon it, however, that the English king and his advisers would by no means have been content to rest on pedantries. They would know that what had been lost by one opportunity might be gained by another, and care would have been taken by degrees that Scotland should have had no opportunity of regaining what she had lost. In feudal history such documents merely make the way to possession. Some feudal observance has been neglected, something has been done on which a quarrel may be picked; and the overlord at last reigns in the vassal's kingdom. Henry could not, perhaps, hope in his lifetime to complete what he had begun; but when Scotland was a quiet province of Britain, ruled by his successors, the merits of his dexterous policy would be remembered.

But this consummation was not to be. In the year 1189 Richard the Lion-hearted became King of England; and one of his first steps was to restore the position of the Scots kingdom by absolutely withdrawing what he described as the conditions which his father had extorted from William by new deeds, and in consequence of his captivity.<sup>1</sup>

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<sup>1</sup> "Quietavimus ei omnes pactiones quas bonus pater noster Henricus Rex Angliæ, per novas Chartas et per captionem suam extorsit." See the discharge at length in the *Fœdera* (Record edition), i. 50,

and five other bishops. They were formally required to conform to the treaty, and acknowledge their direct obedience to the English Church. They denied on the spot that there was any such supremacy over them. The Archbishop of York generally asserted the old claim over Glasgow and Galloway, and appealed to documents in support of it, but Jocelyn, Bishop of Glasgow, maintained that he was under the direct authority of the Bishop of Rome, and no other prelate could step between them. While the Scotch bishops chose so to assert themselves, the English held too high for it, where they had lost their nearest opportunity. King Alexander and his bishops had been supplicants to them for the spiritual title of consecration, having implemented of late whether this or who might be called bishops among the Scots Galloway, really were considered to support this sacred constitution. But now the country had a body of thoroughly educated bishops, who had every element of Catholic leadership, and who could brack at the claims of their English brethren to reign over them. It happened, too, that the English policy of dividing authority in the Church by a double primacy was favourable to the Scots Church. Canterbury and York quarrelled for authority over it. The old tradition that Canterbury was supreme in Britain, as the holder of the power granted to St Augustine, was revived. It was not in this instance asserted as an authority over York, yet it touched that primacy on a tender point. There was more at issue than the mere local adjustment by which the one might be supreme in the north and the other in the south. It was from York that the Scots Church had got its spiritual title, and to York, then, its allegiance as a group of suffragan dioceses was due.

The Scots bishops, on their return, sent agents to Rome. There they managed their business so well that they returned with a bull from Pope Alexander III., which was a thorough triumph to the Scots clergy. In high terms it rebuked the King of England for meddling in matters spiritual by demanding concessions from the Church of Scotland, and forbade York to demand suprem-

acy, or the Scots Church to concede obedience, until the questions at issue were decided at Rome.<sup>1</sup>

A cardinal, Vivian Tomasi, was appointed legate from Rome to take cognisance of the question. He had other business in hand, for he went to England, Ireland, and the Isle of Man, where he asserted the influence of the Church in a special shape by compelling the king of that island to go through the ceremony of marriage with the mother of his celebrated son, Olave the Black. It is said that, as he passed through England, King Henry refused him a passage northward until he made oath to do nothing in prejudice of the English claims. He transacted business with a council in Scotland, but nothing of a substantial kind appears to have come of their deliberations.<sup>2</sup>

But there was a more severe contest at hand between the King and the Church, which threatened to throw Scotland into such a sea of troubles as had just been vexing England. There was a certain Joannes Scotus, Archdeacon of St Andrews, the nephew of the Bishop of Aberdeen, and otherwise influential in the Church. On the occurrence of a vacancy in 1178 he was elected Bishop of St Andrews by the chapter. The king having destined this benefice for Hugo, his chaplain, put him in possession of the temporalities, and managed to get him consecrated. Joannes appealed to the Pope, who put the matter into the hands of the legate Alexius. The legate decided in favour of Joannes, and consecrated him as bishop. A battle now began between the temporal and the spiritual arm. The king banished Joannes, and,

<sup>1</sup> *Registrum Episcopatus Glasg.*, i. 35; *Statuta Eccles. Scot.*, Pref., xxxvi.

<sup>2</sup> "Nothing more is known of the council than that it renewed many ancient canons and enacted new ones. Some of them appeared to have curtailed the immunities and impaired the revenues of the Cistercians. The monks of Rievaulx, the mother of all the Scottish abbeys of the order, sent a letter to the bishops of Scotland adjuring them to repudiate the statutes which their legate Vivian had made against the brethren of Citeaux, and the dull dry page of the Cistercian Chronicle of Melrose sparkles into invective against his rapacity and violence."—*Statuta Eccles. Scot.*, Pref., xxxvii.



as it would appear, some of his supporters, out of Scotland, and the legate professed to lay the diocese of St Andrews under interdict. The affair is spoken of so lightly even by ecclesiastical writers, that it cannot have been considered that the legate could effectually carry out that awful sentence. The Papal Court was again called on to interpose, and the device was adopted of giving power to those who were asserting a spiritual authority over the Scots Church. The Archbishop of York and the Bishop of Durham were invested with legatine powers, enabling them to excommunicate and interdict any persons, lay or ecclesiastic, from the king and the bishops downwards. They set to work with threats, and when any one obeyed these he was punished by the civil power. The quarrel was brought to a sudden stop by a change at Rome. Pope Alexander died, and was succeeded by Lucius III., who disliked quarrels with the temporal powers. There was an immediate adjustment, by which Hugo got St Andrews, and his competitor was made Bishop of Dunkeld.

It will be easily understood that King William the Lion was no favourite with the ecclesiastical annalists who had to record such transactions. The illustrious Welshman Dubarri, better known as Giraldus Cambrensis, goes out of his way to characterise him as a tyrant to the Church, and in fact an imitator of the egregious abuses of the Norman tyranny in England. Yet King William did an act that should have endeared his memory to the ecclesiastical mind, and especially to that portion of it which was then struggling for ecclesiastical supremacy over temporal powers. He founded the great Abbey of Arbroath, endowing it with estates and church patronages stretching over distant districts of the country. The broken remains of the great church of the abbey still testify to its magnificence. But more remarkable even than the splendour of the endowment was the method of its dedication. Usually the memory of saints has been mellowed by antiquity before they have become the object of such dedications; but King William devoted his great gift to the memory of Thomas à Becket, whose blood had been

was made by King Alexander ; and Henry III. met it by a proposal to give the King of Scots certain manors in Cumberland and Northumberland, not in sovereignty, but in feudal property. The offer was accepted as on the whole advantageous to the Scots king, and a relief to the people from hopeless attempts at conquest in a country now strongly united with the central government of England. Any reasonable adjustment putting an end to claims on the northern counties was scarcely less a blessing on the English side. The repeated invasions by the Scots shook the country to its heart. It has to be noticed that we have only the English side of the question in all matters of dispute between the two nations, since all the annalists of the period were Englishmen. They have to tell of the King of Scots coming to do homage to the King of England, as holding estates of him in feudal vassalage ; but the tone of their narratives is as if they spoke of a formidable neighbour coming to demand tribute. It is somewhat as the historians of the later Empire spoke of the Franks, and as the French chroniclers spoke of the Norsemen. They are rude barbarians, coming in all reverence to the court of the civilised sovereign, yet they are objects of uneasiness and alarm. For the estates and honours given to bribe them they do humble homage, yet their rapacity is not appeased—they are not content with the bribe—and again, in an aggressive humour, are crossing the border and threatening their benefactor. The whole story has a significant resemblance to the attempts of the King of France to buy off and soothe the Norsemen, whose chief professed all due homage in proper form, yet, according to a common legend, took a sly opportunity to apply his awkwardness in court fashions, so as to trip up the paramount monarch in the course of the ceremony.

Apart from the question of bringing up the claims on the northern counties, handing over the estates on the border to the King of Scots kept alive the policy of the English court to have him coming there to do homage for something or other. This was perhaps the more desirable that the honour of Huntingdon had now gone to a collateral—the descendants of Prince David, William the

Lion's brother. The precision of old Anglo-Norman records enables us to know the exact nature of the new holdings without letting us see the reasons why some are so different from others. The King of Scots' estates in Cumberland—such as Penrith, Scotby, Sowerby, and others—were held as mere estates in homage, with the proper fealty which the enjoyer of the reality of property had to give for it to the sovereign. This acknowledgment had nominally to be made every year, and the shape in which the King of Scots had to make it was by delivering a falcon at Carlisle Castle. Tyndale and other lands in Northumberland were held by simple homage, not in property, but in regality or sovereignty, subordinate to the sovereignty of England; and here the King of Scots did not merely draw rents and profits as a landlord, but administered justice through his Justiciar.<sup>1</sup> These English estates of the Scots crown are referred to in subsequent documents as "Tynedale and Penrith."

From this period the efforts to extend the Scots frontier cease, and the people of the northern counties of England got quietness for a time, and until they found themselves as part of England invading the inhabitants of the country whence they were so often invaded. The boundary of the two kingdoms had now an opportunity of becoming distinctly and permanently recognised. A few years earlier, in the year 1222, we have a memorandum of the proceedings of a joint commission to measure off the exact line of the marches of the two countries. There were certain knights of Northumberland on the English side; on the Scots the Justiciary of Lothian, with the Earl of Dunbar

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<sup>1</sup> Palgrave, Documents illustrating the History of Scotland, 3-6; *Introd.*, vi. vii. See also Documents illustrative of the History of Scotland from the Death of King Alexander the Third to the Accession of Robert Bruce, "selected and arranged by the Rev. Joseph Stevenson" (published under the authority of the Lord Clerk Register), 2 vols. The first paper in this collection is an account "of the Rents and profits of the Lands and tenements in Tynedale lately belonging to Alexander, King of Scotland, deceased." It is dated in 1286, the year of his death. This is followed by a long succession of documents relating to the estates of the King of Scotland in the north of England.

and other knights. The report of the affair to Henry III. by his chief commissioner preserves the etiquette of equality between the contracting parties. He tells the King of England how they met and exchanged courtesies, and then tried if they could agree in tracing the boundary-line between his kingdom of England and the kingdom of Scotland. It seems to have been a partial attempt only, to begin at Carham, which is now in England, and end at Howdean, near Jedburgh. Six commissioners were chosen on either side. As the six from Scotland would not concur with the view taken by those of England, the joint commission was recast, but again set to work without success. They began at Reddenburn in the parish of Sprouston, a feeder of the Tweed; but when the English proposed to trace by Hoperiglaw and Whitelaw, the Scots would not follow them; and the attempt was abandoned, the English commissioners entering a protest that their line was correct—and it certainly, in touching Whitelaw, agreed with the line of the border as now laid down in the Ordnance Survey. Whether there was any further attempt at an exact tracing of the border line may be doubtful, since in later negotiations we find allowance made for a tract called the debatable land. But the record affords evidence that the division between the two countries, as it afterwards remained, had even at that time settled down by usage, since the line which the commissioners are to find is that of the ancient marches.<sup>1</sup>

The virtual adjustment of the boundaries of the two kingdoms, bought as it was by England with a price, gave peace for a time on the border, but the reign of the young prince was amply troubled elsewhere. He inherited from his father difficulties in many shapes as to the outlying provinces, as they might be termed—those to which the King of Scots professed a title which he could rarely make effective. He had not much authority north of the Tay,

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<sup>1</sup> “Qui rectam perambulationem facerent inter regnum vestrum Angliæ et regnum Scotiæ;” and again, “quod rectas et antiquas marchias et divisas inter regna prædicta recognoscerent.”—Royal and other Historical Letters illustrative of the Reign of Henry III., Rolls edition, i. 187.

and the regions beyond the Moray Firth were still in the hands of a representative of the old Maarmors sufficiently strong to make war on the King of Scots. In the West Highlands—the old patrimony of the race of Fergus—there was a ruler whose title came from the conquests of the Norsemen; and the family which predominated in Galloway asserted a sovereign position by overtures for alliance with the King of England. This family had murderous internal disputes; and when these ended in the supremacy of one branch, its interest in the support of the King of Scots was furthered by its head, Allan of Galloway, becoming Lord High Constable, as the office came to be called, of Scotland. It happened to his posterity to have a closer connection with the destinies of Scotland, from his daughter marrying the head of the house of Baliol.

Of the untamed condition of the northern district there had been a recent example in the fate of a poor bishop, who was daring enough to attempt to become a spiritual shepherd in distant Caithness. Harold, earl or king of Orkney, had been driven from a settlement in Caithness, which he determined to retake if he could. He arrived with ships and men, and found the new bishop there installed. The bishopric was created by one of the sons of St Margaret, and was therefore an assumption of authority over the northern district by the King of Scots. Whether on this account, or because the bishop attempted to levy "Peter's pence," the earl was savagely enraged; and finding the bishop coming forth from his palace at Scrabster on the west coast, seized him, and horribly mutilated him. It is significant that this narrative comes from the Scandinavian side, and would have continued to be doubted, as it had been, were it not confirmed by Pope Innocent III., better informed than the King of Scots about an event in which the Church in Caithness was concerned. He had been told of it, indeed, by the Bishop of Orkney, who would feel an interest more acute than satisfactory in such an affair; and Innocent, writing back in the year 1202, acknowledges the substance of the news: "We have learnt by your letters that Lombard, a layman, the

bearer of these presents, accompanied his earl on an expedition into Caithness; that there the earl's army stormed a castle, killed almost all who were in it, and took prisoner the Bishop of Caithness; and this Lombard, as he says, was compelled by some of the earl's soldiery to cut out the bishop's tongue." The Church, having been so successful with the great King Henry of England, was not likely to spare this petty ruler, and precise articles of penance were laid down for him. For fifteen days he was to walk about conspicuously in his own territories with bare feet, and only clothing enough for decorum, his tongue being tied so as to hang forth from his mouth, while he suffered the active discipline of the rod. He was then within a month to set forth to Jerusalem, and there serve the Cross for three years. When all this, with some minor penalties, was accomplished, he might be received within the bosom of the Church.<sup>1</sup> The Orkney earl, however, was not so easily accessible as the King of England. We know only that the penance was evaded. The affair tended to the consolidation of the dominions of the King of Scots, for it induced William the Lion to march northwards and strike one more of the many blows which at last broke the power of the rulers beyond the Moray Firth.

It must have been some time before the year 1240 that an event of national moment occurred, rendered mysterious by the way in which it came to the knowledge of later times, since it is mentioned in none of the usual chronicles, and is only known because, some fifty years afterwards, the person chiefly concerned founded on it for the purpose of accomplishing an object. It was brought up in the discussions about the succession to the crown in 1291 by Robert Bruce, Lord of Annandale. He asserted that Alexander II., despairing of issue, had brought the succession to the crown under the consideration of the prelates, nobles, and good men of the country—of a parliament, such as there then was—and that the result was an

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<sup>1</sup> Orkneyinga Saga, 415: Epist. Innocent III.; and other authorities cited in "Two Ancient Records of the Bishopric of Caithness."—Bannatyne Club, 1848.

arrangement that, if he died childless, Robert Bruce was to succeed him as king, being the nearest male relation.<sup>1</sup>

The arrangement was not an unlikely one. Bruce was a son of Alexander's cousin-german, the daughter of David, Earl of Huntingdon. He was then the only male descendant of any daughter of Earl David, though others came afterwards and competed for the succession, as we shall see.

The family of Bruce was one of the most powerful in the north of England. It is one of the many Norman houses illustrious since the Conquest, but not very easily to be traced further back, though in this instance the efforts to stretch the pedigree have been very vigorous.<sup>2</sup>

The house of Bruce was a fine type of those Norman races in whose hands were the destinies of so many European communities. Why they should have been so loved and courted, is one of the mysteries in the history of social influences. What they were at the court of Edward the

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<sup>1</sup> Bruce asserted that there were those alive who could testify to the fact; and although there were many exaggerations and falsehoods in the pleadings of the competitors for the crown in 1291, it is difficult absolutely to disbelieve such an assertion. There is no statement of its having been contradicted on the notarial record of the discussion, where it is distinctly minuted (see *Fœdera*, Record edition, i. 777). It is referred to in the fragments, discovered from time to time, of the pleadings and documents connected with the great competition; but in these, too, there is no trace of a contradiction. The occasion of the affair was, it seems, Alexander's departure to a war in the Isles. In the year 1249 he set off on such an expedition, and died on the way. This cannot, however, have been the war referred to by Bruce, for his statement is, that Alexander was in despair of having an heir of his body—*desperans de hærede de corpore suo*; but when he went on this expedition he left his son behind him. This son was born in 1241, by his father's second marriage in 1239.—See Sir Francis Palgrave's Documents and Records illustrating the History of Scotland.

<sup>2</sup> Attempts have been made to bring the cradle of their race home to Scotland, in Bruse, a son of the Earl of Orkney by a daughter of an early Malcolm of Scotland, whose descendant went with Rollo to France, and built the Castle of Brix. According to some Norse authorities, however, Bruse was a son of Sigurd, Earl of Orkney, by his first wife, while the daughter of Malcolm was his second (see vol. i. p. 321). Few of the Norman houses are so well worth tracing backwards, were there any chance of success in the pursuit.

Confessor, they became in the courts of the Scots kings from David downwards.<sup>1</sup>

In looking to the success of the Normans, both social and political, as a historical problem, it has to be noted that we have no social phenomena in later times with which this one could be measured and compared. Coming from the rude north into the centre of Latin civilisation, they at once took up all the civilisation that was around them, and then carried it into higher stages of development. We have no parallel to this in later times. Civilised communities have not found barbarians improving on them. If we were to see exemplified the phenomenon of the rude sea-rovers transformed after a couple of generations into the courtly Normans, we must suppose some of the barbarous races we have come in contact with in America, Africa, or Australasia, becoming more civilised than ourselves. There was in the case of the Normans a preceding cause, however, apparently necessary to such a phenomenon, but happily wanting in later times. The barbarians were the invaders, not the invaded; they were from the beginning more powerful physically than the civilised people whom afterwards they were to excel even in civilisation.

Though neither was a sudden affair like the conquest of England, yet their migration to France, and their migration to Scotland, were things as different from each other as the rough sea-rover is different from the courtly knight

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<sup>1</sup> Sir Thomas Gray, in his Chronicle, written early in the fourteenth century, tells how William the Lion brought with him, when returning to Scotland from his captivity, younger sons of the families to whom he was indebted for courtesies, and how he endowed them with lands. We cannot take the passage as precise statistics. We may get more from it by counting it as the shape into which the chronicler put the traditions of the migration of the great Norman houses to Scotland. In this view the list of names is instructive: "Il enprist od ly en Escoce plusours dez fitz pusnes dez seynours Dengleterre qi ly estoient beinuollauntz, et lour dona lez terres des autres qy ly estoient rebelis. Si estoint ceaux dez Baillolfs, de Bruys, de Soulis, et de Moubray, et les Saynciers; lez Hayes, les Giffardis, les Rame-says, et Laundels; les Biseys, les Berkleys, les Walenges, lez Boysis, lez Mountgomeris, lez Vaus, lez Colevyles, lez Frysers, lez Grames, lez Gourlays, et plusours autres."—*Scalacronica*, 41.



endowed with all the attributes of chivalry. One would think that, looking to their history, they might have been deemed dangerous guests. Yet the formidable qualities that made them so, might be in some measure the reason why they were courted. Perhaps there was a feeling that protection was to be found at the hands of that mighty race who were subduing all others unto themselves—such a feeling as induces Oriental governments to attract European adventurers to their courts. Supreme in England, and everywhere stretching the boundaries of their power, it may have seemed a wise precaution against the aggrandising efforts of such potent neighbours to give them a stake in the nationality of Scotland. Supposing this to have been the policy which filled Scotland with Norman adventurers, and gave them estates, titles, and offices, it might seem to have been a sad failure at the time when the most eminent of these Normans were competing with each other to sell the independence of the country as the price of wearing its degraded crown. Yet in the end it was the descendant of the earliest and most highly favoured of these adventurers that wrested Scotland from the Plantagenet kings, and established in the country a permanent national government.

The Normans were by no means popular throughout the country. We have seen that on the death of Malcolm III., their first patron, a change of dynasty was almost effected upon the policy of driving them out. In some places they were long unwelcome. An English chronicler, generally well informed, tells how the wild men of Gallogway, whom we have seen so eager to be let loose on the Normans at the Battle of the Standard, when they returned home from that affair, put to death all the French and English strangers they could lay hands on. They took the opportunity of the king's captivity to rid themselves at the same time of the representatives of royalty; but as to these they were content to drive them out of their country.<sup>1</sup> It tends to confirm this story, that the Nor-

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<sup>1</sup> "Statim expulerunt a Galueia omnes Ballivos et custodes quos Rex Scotiæ eis imposuerat, et omnes Anglicos et Francigenas quos apprehendere poterant interfecerunt."—Benned. Ab.

man adventurers were shy of Galloway as a suitable place of settlement, and the absence of names belonging to their race among the early landholders there, has been noticed as conspicuous.<sup>1</sup>

Among the Irish Celts of the western and central Highlands, on the other hand, this policy of planting Norman settlers appears to have been very effective. It is a peculiarity of these races that they must have leaders—they cling to the institution by a law of their nature; and if the desired dictator and guide do not come in one shape, they will take him in another. This was a disposition exactly adapted to the Norman feeling of superiority and command. Accordingly, we find that, when these adventurers got themselves established, they rallied round them devoted clans of followers, who looked up to them as their natural leaders and commanders. An incident occurred in the year 1242 which showed the tendency of such connections, and had an important influence on subsequent events. The house of Bysset had great possessions in the Highland country around Loch Ness. In the year 1242 there was a tournament near Haddington, where some of the family of Bysset, with their followers, were present. It so happened that one of them was unhorsed by the young Lord of Athole. Speedily afterwards Athole was slain, and the house in Haddington where he abode was burned: it was probably built of wood, according to the practice of the period. The Byssets could not clear themselves from this unchivalrous deed. It was, indeed, clearly the doing of their followers; and Highland history shows us that, in times far later, it was impossible to restrain the vengeance of such followers when insult or injury was done to their leaders. Of any such law of chivalry as that which contemplated conflict without deadly malice, and permitted a victor to live if he could be slain, they could form no conception. A strong feeling set against the Byssets. Their estates had to be forfeited, and the head of the house escaped alive with great difficulty. The family afterwards pushed their fortunes with the other

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<sup>1</sup> Innes's Sketches, 96.

Norman houses in Ireland, and their Highland estates went to the Frizelles or Frasers, who founded an influence which became troublesome to the government five hundred years afterwards.

In the mean time the head of the Byssets found refuge at the court of King Henry III. Here, as the chroniclers tell us, he maintained that he had a right to appeal against the forfeiture to the English king as lord paramount of Scotland. In all such questions, great or small, it is well known that the raising of a practical point has an immense influence in bringing wide questions of principle to a bearing. This eminent leader, pleading his practical grievances of condemnation by a sort of ostracism and the forfeiture of his estates, was supposed to have gone far in impressing on the English court the policy of practically asserting the superiority over Scotland. Something was said at the same time about the Scots king encouraging English traitors and enemies of the English king. It is difficult altogether to find sufficient immediate cause for what occurred in 1244, just two years after the affair of the Byssets. A great English force then marched to the border and menaced Scotland, while a Scots army was mustered for the defence of the country. It amounted, if we may believe the chroniclers, to above a hundred thousand men, and passed over the border into English ground.

This hostile array on both sides is all the more unwelcome a difficulty, that we are told by the chroniclers how, two years earlier, when King Henry was called abroad, he left his close friend, the King of the Scots, in charge of the border districts,—those very territories which the kings of the Scots had been for centuries striving to bring under their own dominion. It has been supposed that there was some foreign element of anxiety or umbrage to the English king arising out of Alexander's second marriage, when he took to wife Mary de Coucy, a lady who figures more in her son's reign than her husband's. But the alliance itself could not have been the direct cause of offence, for it was now five years old, dating in 1239.

Whatever may have been the cause of the demonstration, it was insufficient to incite to blows. If the Scots

king was at the head of so large and well found a force as the chroniclers speak of, there was on the other side an element new to an English army, and not, perhaps, one productive of much confidence on the eve of a battle. To put to use the new acquisitions of the English kings, bands of the Irish were brought over under their native chiefs or kings, and we find King Henry with all solemnity recording his thanks to some twenty of these, with as near an approach to their proper designations as the Norman scribe could accomplish.<sup>1</sup>

Thus there was no fighting, and the sovereigns came to terms in the "Treaty of Newcastle." In its adjustment, no reference seems to have been made to homage on the part of the King of England, or to possessions south of the border on the part of the King of Scotland; but each engaged not to abet the enemies of the other, and not to make war on the territories of the other without just provocation. From the tone of the chronicles it might be inferred that King Henry found his army averse to a contest; that the spirit of the Englishman prevailed over that of the Norman aggressor; that there was a friendly feeling towards the Scots; and, in short, that the army could not see a legitimate ground of quarrel. Another consideration which may have rendered restraining councils the less unwelcome to the Norman mind is suggested by subsequent events. If conquest was the object, Wales afforded a more likely field for the employment of Henry's army; and at all events, a cruel war there immediately followed the demonstration on the Scots border.

Alexander II. died in the year 1249, in the small barren island of Kerrera, which fronts the Bay of Oban. He was there on an expedition to extend, partly by negotiation, partly by force, the authority of the crown of Scotland over these islands and northern districts, which, so far as they were not in the hands of independent local rulers, held rather of the King of Norway than the King of Scots. Alexander boasted that he would set his standard on the cliffs of Thurso, a threat inferring that it was to wave

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<sup>1</sup> *Fœdera*, 7th July 1244.

## CHAPTER XV

NARRATIVE DOWN TO THE DEATH OF THE  
MAID OF NORWAY.

ALEXANDER III.—HIS BOYHOOD—INFLUENCE OF HIS MOTHER, MARY DE COUCY—HIS INAUGURATION AS MONARCH, AND THE PECULIAR CEREMONIES OF THE OCCASION—GREAT QUESTION OF THE ANOINTING OF THE SCOTS KINGS—ITS CONNECTION WITH THE CLAIMS OF ENGLAND AND OF THE COURT OF ROME—FULFILMENT OF TREATY OF NEWCASTLE—MARRIAGE OF THE YOUNG KING WITH AN ENGLISH PRINCESS—THE QUESTION OF HOMAGE—THE RULE IN SCOTLAND DURING THE MINORITY—FACTIONS OF THE COLLATERALS LOOKING FORWARD TO THE SUCCESSION—COMYNS AND DURWARDS—INTERFERENCE BY THE ENGLISH KING—THE ISLANDS, AND THEIR CONNECTION WITH NORWAY—HACO'S INVASION—THE BATTLE OF LARGS—ITS INFLUENCE—INCREASE OF TERRITORIAL POWER—TAXATION OF THE CHURCH—BAGIMOND'S ROLL—ECCLESIASTICAL COUNCILS—AN ECCLESIASTICAL CODE—TAMPERINGS WITH THE RECORDS OF HOMAGE—HOPEFUL FUTURE OF THE COUNTRY—DISASTERS—DEATH OF THE KING'S DAUGHTER, THE QUEEN OF NORWAY—DEATH OF HIS SON—HIS OWN DEATH—DEATH OF THE HEIRESS, THE MAID OF NORWAY.

ALEXANDER II. left a son who succeeded him, with the title of Alexander III. He was not eight years old when the succession opened to him. There was no attempt to compete with his claim; and here was another instance, following that of Malcolm IV. at an interval of nearly a century, to show that there was a principle of hereditary stability in the succession to the crown. His mother came of a remarkable stock. Alexander II.'s union with Joan of England had been unfruitful, and soon after her death in 1239 he took to wife Mary, daughter of Enguerand de Coucy. This family specially represented

Perhaps the secret why the chronicler is so picturesque and circumstantial about the coronation of the young king is, because it came to be connected with some curious questions about the inauguration of a king of Scots. There stands on record a courteous letter to King Henry of England by Pope Innocent IV., professing to be an answer to Henry's earnest request that the Pope would take steps to prohibit the anointing and crowning of the young King of Scots, because he was the liege vassal of the King of England. The Pope tells him not to be surprised at the refusal of such a request, as there was no precedent for compliance with it. At the same time, the King of England might be assured that the Court of Rome would take no steps likely to interfere with the royal dignity of a sovereign.<sup>1</sup>

It is at first sight difficult to understand how Henry could expect his request to be of any use, for Innocent's letter is dated in 1251. The young king was crowned, according to the chronicles, on the 13th of July 1249, six days after his father's death.

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Skene's edit., 294) applies to a Highlander. He is "*quidam Scotus venerabilis . . . quamvis silvester et montanus honeste tamen pro modo suo indutus.*" He speaks *materna lingua*, and there is an attempt to report the commencement of his address, thus: "Benach de Re Albanne Alexander, Mac Alexander, Mac Vleiam Mac Henri Mac David, &c., *quod ita sonat Latine, Salve Rex Albanorum Alexander Fili Alexandri Filii Willielmi,*" &c. The genealogy is carried back into remote fabulous ages; and this portion of the episode is less credible than the rest, as there is reason to believe that these very ancient genealogies of the kings of Scots were the creation of the chronicler's own day. Scone is near the Highlands, and the appearance there of a mountaineer could not be very wonderful at any time, or, indeed, worth notice. In this instance, however, it forced itself on the chronicler's notice by the important and unusual function performed. The story suggests the probability that the Celts still retained a stronger position in the country than the ordinary annals give them, because these were written in later times, when the Celt had become a creature to be hunted off the earth. Had we earlier authentic chronicles, we would doubtless know more of the steps by which the predominant race of the Dalriadic Scots sank into what they afterwards became. It is observable that Lord Hailes does not stoop to mention the episode of the Highland sennachie. Highlanders had not become fashionable in his age.

<sup>1</sup> *Fœdera* (Record edition), i. 277.

But was this a coronation of the solemn kind which King Henry desired to defeat? Was King Alexander crowned and anointed with the ceremonies authorised at Rome? The anointing of kings, according to the tradition of the scriptural usage, was one of the influences made available for diplomatic purposes by the Court of Rome. Many kings were strong enough to hold their own without it, yet it gave a tone of respectability and solemnity to the rule of those who got it, and thence was much coveted. Its extension in any new direction was ever a matter of grave consideration, in which the importance of admitting a new member among the ecclesiastically sanctioned monarchs must be weighed against the displeasure and jealousy of those already included. Properly, indeed, to be anointed was the sole privilege of the Emperor, as holding civil jurisdiction over the Christian world co-ordinate with the Pope's spiritual jurisdiction. But other monarchs came to be more powerful than the Emperor. So the kings of England and France were admitted to the privilege, along with the King of Jerusalem, whose position gave him peculiar claims. There are traces of the anointing having been twice requested for Alexander II., and twice refused; and it does not appear to have been conceded to Alexander III. That a crown came to be used when a king of Scots was inaugurated, is shown by the appearance of such an article from time to time as a valuable piece of property. But it appears that a full coronation, in the ecclesiastical sense of the term, was not conceded to any king of Scotland earlier than David, son of Robert the Bruce.<sup>1</sup> It is certain that in the great pleadings held before King Edward I., when he asserted his claim as Lord Paramount of Scotland, it was put as a material point that the King of Scots was never anointed. Indeed it was said that the

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<sup>1</sup> See in the Notes on the Preface to the *Statuta Ecclesiæ Scotticæ*, p. xlviii. *et seq.*, a very curious critical examination of the accounts of the inauguration of the kings of Scots, tending to the conclusion that the phraseology of the chroniclers is influenced by their sense of the imperfectness of the ceremony, as wanting the ecclesiastical element.

ceremony of his installation was less solemn than that of the Prince of Wales, who was decorated with a garland, and placed on his throne by bishops.<sup>1</sup>

After the young king's inauguration, the next step was to give effect to a condition in the Treaty of Newcastle, by which he was to become the husband of the English princess Margaret. King Henry took care that this should not be long delayed, and they were married at York on Christmas-day in the year 1251. The Archbishop of York performed the ceremony, and had the responsibility of entertaining the illustrious guests. The King of England was there, so was Mary de Coucy, the mother of the young king, with a great foreign attendance; and few affairs in that age were surrounded with more lustre than the marriage of these two children. We have it on the authority of the English chronicler, Matthew Paris, that the young king went through the form of homage for his English estates, Penrith and Tyndale; that Henry demanded of him homage for Scotland also, and that he made answer that this affair, on which he had not consulted with his proper advisers, the notables of his realm, was too important to be discussed on a festive occasion like the present. Further, that King Henry, unwilling to disturb the harmony of the meeting, pressed the matter no further, but kept his own counsel. This is briefly told by Matthew as if it were a small matter, and his authority for it as an actual occur-

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<sup>1</sup> Chronicles of St Albans, Rishanger, 339. It was argued from this that Wales was a fief of the English crown, a grade higher than Scotland in feudal dignity.

If King Henry's protest against the anointing was concocted with an intention to assert a claim as lord paramount over the minor king, it is significant that he made no actual attempt to assert such a position. Nothing was more firmly fixed in feudal practice at that period than that the superior held the fief during the vassal's minority. Henry never exercised this right of a superior, and in any other shape than the letter of Innocent there is no vestige of his having professed such a right. Indeed he took up a position quite inconsistent with the functions and position of a lord paramount. It fell to him, as we shall see, to interfere a good deal in the affairs of the country, and in doing so he styled himself "Principal Councillor to the illustrious King of Scotland."



rence must just go for what it is worth.<sup>1</sup> It may be said, however, that King Henry had far more likely opportunities for pushing the question of the feudal superiority, but that his whole line of ostensible conduct was that of one who sought to influence the Government of Scotland as the father-in-law of the boy-king, rather than of one desirous of accomplishing the subjection of the country.

Any attempt to go into the details of the manner in which the country was ruled during this king's minority must of necessity become confused, because it is filled with intrigues and counterplots and efforts of personal ambition, while neither can the actors nor the policy they pursued be brought out so distinctly as to enable us to take an interest in them. A boy on the throne, with no brother or other near heir, was a condition which naturally stimulated collateral relations to take up a position for prompt action should an opening occur. It happened that there was a cluster of such collateral relations, all ambitious Norman barons, with possessions both in England and Scotland. Their several genealogical standings will have to be noticed afterwards when their claims come up in a practical shape. Meanwhile the most powerful among them was a member of the great family of Comyn, who held many honours and large estates. Opposite to this influence stood that of Durward the Justiciar. He was married to an illegitimate daughter of Alexander II. He was accused of an intrigue of an extremely significant character in the possible fruit it might bear if successful: this was a negotiation with the Pope to legitimate his wife, and make her the next heir to the throne. That he tried to accomplish such a project will be seen more than once coming up in the disputes about the succession to the crown which became so momentous to the country. Durward's party, which was favoured by England, seized the Castle of Edinburgh, and, according to their own phraseology, "liberated" their young sovereign from subjection to the Comyns. Just after this event, in the year 1255, King Henry, who had sent emissary after emis-

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<sup>1</sup> Edit. 1644 (by Wats), p. 555, Giles's translation, ii. 469.

sary into Scotland, thought it necessary to come himself, attended by a considerable force. He met the young king at Roxburgh, and before he turned southwards adjusted the government of Scotland to his satisfaction. The seizure of Edinburgh Castle, however, had set a precedent often followed in Scots history—that of kidnapping a monarch and ruling in his name. The party of the Comyns was strengthened by the arrival in Scotland of the king's mother with her second husband, John de Brienne, son of "the King of Jerusalem." The party were strong enough to seize the king at Kinross, and along with him they got possession of a movable, then but of recent appearance, but gradually becoming a symbol of important powers—the Great Seal of the kingdom. This was in 1257. Soon afterwards the Comyns lost their leader, the Earl of Monteith. Whether from this event or not, a regency was formed, which did not look so dangerous as to demand the interference of King Henry, who seems for some years to have let the country alone. In the year 1260, in critical domestic circumstances, the young king and queen visited the court of King Henry; and here, in the same year, a daughter was born to them, named Margaret, and destined to be an important personage in Scots history.

Three years afterwards there was a memorable invasion of Scotland by the King of Norway. It was the concluding act in the career of the Norsemen or Danes in Scotland, and affords an opportunity for resuming the history of their connection with those outlying provinces which finally became incorporated into Scotland. We have seen how the Norsemen had established a central power in Dublin, so strong that it appeared likely to become the capital of a great sea-empire in the north. We have seen that the prospect of an empire on the waters gradually faded as the descendants of those who lived and fought upon the sea peopled the British Isles and other habitable districts of the north. The chief of the "Ostmen" in the south-east of Ireland gradually merged into a dynasty of monarchs. They were called the Hy Ivar, or descendants of Ivar, carried back by the dynastic spirit

of the Irish annalists to an ancestry in "the royal race of Lochlin." The Hy Ivar had their relations from time to time with the chiefs of Scandinavian origin nearer Scotland, but all chance of a united Norse empire stronger than the power of the kingdom of Scotland was at an end. In Irish history, the supremacy of the Ostmen comes to an end in a notable historical climax. In the great battle of Clontarf in 1113, when the mighty Brian Boroom, the hero-king of the old Celtic race, was killed, his cause prevailed, and Ireland was entirely restored to the command of the native Irish sovereign, Dermot Mac Malnembo. It is a peculiarity, however, of battles in Ireland, that while in the heroic narrative of the historian they have suddenly made an empire out of chaos, there is no perceptible difference in the actual condition of the country; and the Ostmen appear to have held after the battle their old position, and to have retained it until the invasion of Ireland by men of the same race from England.<sup>1</sup>

Coming nearer to the Scots kings' dominions, we find at the beginning of the twelfth century the great Magnus Barefoot reigning supreme in Man and the islands of the west. He was a monarch of sufficient power to hold diplomatic relations with the King of Scots, and a

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<sup>1</sup> The most valuable commentary on the history of Ireland during this period, and on the relation of the Irish "Ostmen" to the other Scandinavian colonists in the British Isles, is in the late Dr Henthorn Todd's Introduction to 'The War of the Gaedhil with the Gaill.' His general conclusion is thus given: "The Norsemen of Ireland were not seriously affected in their position by the victory of Clontarf. They retained their hold of the great seaports, and the Irish annals for some time continue to record the usual amount of conflict between them and the native tribes. We read, however, of but few new invasions; and the design of forming in Ireland a Scandinavian kingdom, which seems to have influenced such men as Sigurd of Orkney and the Viking Brodan, was certainly abandoned. The national distinction between the Irish and the Danes, however, continued until after the Anglo-Norman invasion; the Danes then, in several places, sided with the native chieftains, but in many instances they appear to have recognised in the new-comers a common origin. In the seaport towns especially, a common interest produced alliances by which the peculiarities of the two races were at length softened down, and both were at length confounded by the Irish under the same generic name of GAILL, or foreigners."—P. cxcix.

very formidable neighbour. It is told in the Sagas that he claimed the Mull of Kintyre as one of his islands, and in a spirit of menacing jocularity had one of his vessels dragged across the isthmus of Tarbert, he sitting at the helm.<sup>1</sup> The inhabitants of these islands appear to have been still, and to have continued for generations afterwards, a wealthy community, like all the others that retained any remnant of the enriching influences of the sea-rovers of old.<sup>2</sup>

Magnus was afterwards killed in an effort to restore the Norse influence in Ireland. He left his son Sigurd as ruler of the Isles; but when he went to succeed his father as King of Norway the colony broke up again into separate independencies, the respective histories of which cannot be pursued to any instructive effect. There was a general division of the whole into Nordureyer or Norderies, and Sudureyer or Suderies, the northern and southern division. The dividing-line was at the Point of

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<sup>1</sup> Munch, Chron. Man, 66.

<sup>2</sup> The following passage is from a book of small bulk, but full of learning and intelligence, the *Geographical Illustrations of Scottish History*, by David Macpherson (Isles): "Under the government of these Norwegian princes the Isles appear to have been very flourishing. They were crowded with people; the arts were cultivated, and manufactures were carried to a degree of perfection which was then thought excellence. This comparatively advanced state of society in these remote isles may be ascribed partly to the influence and instructions of the Irish clergy, who were established all over the island before the arrival of the Norwegians, and possessed as much learning as was in those ages to be found in any part of Europe, except Constantinople and Rome; and partly to the arrival of great numbers of the provincial Britons flying to them as an asylum when their country was ravaged by the Saxons, and carrying with them the remains of the science, manufactures, and wealth introduced among them by their Roman masters. Neither were the Norwegians themselves in those ages destitute of a considerable portion of learning and of skill in the useful arts, in navigation, fisheries, and manufactures; nor were they in any respect such barbarians as those who know them only by the declamations of the early English writers may be apt to suppose them. The principal source of their wealth was piracy, then esteemed an honourable profession, in the exercise of which these islanders laid all the maritime countries of the west part of Europe under heavy contributions."

of Ardnamurchan, the most westerly promontory of the mainland of Scotland, so that Iona was included in the Suderies.<sup>1</sup>

About the close of the twelfth century, a chief or king named Somerled is found exercising a wide but undefined authority both in the Islands and that part of the western mainland which formed the territory of the ancestors of the Scots kings.<sup>2</sup> He was the husband of the daughter of Olave, who had succeeded to power as the representative of the race displaced for a time by the visitation of Magnus and the succession of his son. Of Somerled's own origin there is no distinct account. He is said to have been of Celtic family, and the power to which he raised himself is supposed to have brought the Celts of these districts under the paternal influence of rulers of their own race, by a reaction or a successful revolt against the Norse oppressors, such as that which the Irish claimed from the battle of Clontarf. For this, however, there seems to be no authority, and he was probably an able and successful Viking.<sup>3</sup> Somerled, as we have seen, patronised the pretender to the Maarmorship of Ross, and invaded Scotland in his behalf. Through conflicts of various kinds he became to be, if not the sovereign of the

<sup>1</sup> Hence the English bishopric of Sodor and Man—Sodor being the southern division of the Scots Hebrides, and not then part of any English diocese. In its earlier days the bishopric would be under the primacy of Drontheim. The Bishop of Sodor and Man has no seat in the House of Lords, owing, as it is commonly said, to Man not having become an English possession when bishops began to sit as lords by tenure.

<sup>2</sup> The latest sea-fight in the old Viking spirit in the neighbourhood of the Scots coast is connected with his career. It was fought in the year 1156 with Godred, who represented the reigning authority in Man itself, while Somerled commanded in the other islands.—Chron. Man, A.D. 1156.

<sup>3</sup> In the Sagas a "Sumarlad" is mentioned as a brother of Einar and Bruse, the two competitors for power in Orkney, mentioned above (vol. i. p. 321).—Munch, *Norske Folks Historie*, b. 649. The name occurs among the colonists of Greenland—*ibid.*, 363. It has been derived from old Norse, meaning "a summer stranger," as if it pointed to an unwelcome visitor appearing occasionally at the season most appropriate for Viking expeditions.

Isles and of Argyle, certainly the holder of the chief power over these districts. Altogether, however, both in his origin and the position he attained, he holds a shadowy place in history. The death of Somharlid, a son-in-law of King Olave of Man, is told with great distinctness. He appeared in the Firth of Clyde with a fleet of a hundred and sixty vessels, having projected the subjugation of all Scotland; but at Renfrew the divine vengeance overtook him, through the hands of a small body of men, and he was slain with a countless number of his followers; but this occurred in the year 1164, a period later than that of the shadowy Somerled of tradition.<sup>1</sup> His renown has come chiefly from the houses he founded. The Islands and Argyle, according to Highland story, were separated and inherited by his three sons, and afterwards subdivided among their descendants. If this be true, then the result of the ambition and ability of this chief of unknown origin was not to supersede but to break up the empire of the Norsemen. The traditions of nearly all the clans in the West Highlands and Isles carry back the ancestry of their chiefs to this mysterious Somerled.

It was only natural that as the Scots kings increased in strength they should be desirous to annex these districts. When it was maintained that the absorption of the Isles and Argyle was only the recovery of the oldest possessions of the crown, it can be said that the same excuse for aggression has been made in countless other instances, ancient and modern, with far feeblér justification; for these were in reality the cradle of Scots royalty, and the eastern districts, which were the strength of the kingdom, were recent acquisitions. Accordingly, there was a pressure on the power of these western chiefs. Argyle became nominally a Scots shire, with a Sheriff representing the crown. Demands were made here and there of the chiefs to acknowledge feudal tenure on the Scots crown, and it was in an expedition to push these requisitions that Alexander II. died at Kerrera.

Of all the old Scandinavian empire near Scotland,

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<sup>1</sup> Chron. Man, A.D. 1102-64.

question of keeping as dependencies all the islands and the western districts on the mainland over which Norse chiefs had held rule. In the winter of 1262, King Haco issued warrants for a conscription for this purpose over all his dominions. He was a despotic king, and well obeyed. In the summer his mighty fleet assembled at Bergen. There his son Magnus offered to command the expedition; but the old king, though, as the chronicle says, he had reigned six-and-forty winters, would not depute so critical a command, and left his son regent of his kingdom. The fleet sailed to the Orkney Islands, where of course it was at home. Ere he left these friendly islands there came a portent that might have disturbed a less resolute leader. At Ronaldsvo there fell a great darkness, so that there was only a thin bright ring instead of the round sun. It has been calculated that there must have been an eclipse of the sun, which at twenty-four minutes past one on the 5th of August was annular at Ronaldsvo.<sup>1</sup>

The fleet sailed on to Caithness, which was filled with Norsemen, not very tightly ruled by the Scots king, nor much devoted to him. Here there does not appear to have been any one who professed to represent the crown of Norway; but when he passed southward among the islands, the king had to deal with persons distracted by cruel difficulties. In the first place, they aimed at a separate authority, independent of any superior. If they were to have a master, they were all too conscious of the nearness and increasing power of the King of the Scots; but here was for the moment another master at their doors, with utterly overwhelming power at his command. Some of them had been invested with estates on the mainland. When the King of Scots had come to terms with any of them, he generally secured the fulfilment of the bargain by bringing hostages to the mainland.<sup>2</sup> Among those now secured was the King John who had held treaty with

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<sup>1</sup> Arch. Scot., iii. 364: the calculation was made by Sir David Brewster.

<sup>2</sup> See in Arch. Scot., iii. 367, items of account for the maintenance of these hostages.

Alexander II. According to the Norse accounts, he flatly refused to aid Haco, because he had sworn allegiance to the Scots king, of whom he held more land than of the King of Norway. Haco sailed southward by the Lewis, and at Skye was joined by his son-in-law Magnus, King of Man. In passing still southward he levied on the lords of Cantyre and Isla, who tendered him submission, a purvey of a thousand cattle; and if he received them, it is clear that these districts must have been well grazed.

In the Norwegian account of the expedition we read of many descents on the west coast by detached parties, occasionally penetrating to some distance inland. One of these was a feat so eccentric and original that it must not be passed over. A detachment or squadron of sixty ships, commanded by Magnus of Man, sailed up Loch Long. There they found that the narrow isthmus of Tarbet, quite flat, and only three miles across, separated them from Loch Lomond. They dragged some galleys over this impediment, and launched them on Loch Lomond. Along the broad eastern end of that lake stretches the district of the Lennox, one of the most fruitful in Scotland. This was fresh ground for pillage, and not likely to be guarded against marauders coming from so unlikely a direction.

The climax of the great expedition is reached when the main fleet of 160 vessels, sweeping round the Mull of Cantyre, casts anchor between Arran and the coast of Ayrshire. According to the Norwegian accounts, the Scots sent negotiators who would have been content to retain the mainland and the islands enclosed by it, Arran, Bute, and the Cumbraes, leaving the outer archipelago to Norway. The proud master of that great force, however, would give up nothing coming within his claims; and then it was observed that the Scots became shy of further treating, because winter was coming, and that a force was gradually collecting on the heights overlooking the Ayrshire coast.

That winter was propitious to Scotland. It was of the kind that at the present day would be recorded as disastrous to shipping on the western coast. Storm followed storm, breaking up the mighty fleet of Haco, by vessels



running foul of each other, or getting stranded or water-logged, or dashed against the rocky shores. One of these disasters brought a crisis. Some galleys were stranded on the coast near the village of Largs. Their crews, when they got on shore, naturally met a hostile reception. The fleet sent assistance; but as more assistance was sent, still more was needed, as the hostile Scots were increasing in numbers. At last Haco resolved to do battle, and landed a force. According to the Norse accounts, they fought gallantly, but were overwhelmed by numbers. This is probable; but at the same time there does not appear to have been what could be called an army on the Scots side. There seems to have been little more than the old gathering of the country to resist an incursion of the Northmen, though perhaps there was more to defend, and better defenders, than there might have been centuries earlier. There were, according to the Norse account, fifteen hundred mounted and mailed men-at-arms among the Scots. That any national preparation for defence had been made, however, seems improbable from all that comes to us on the Scots side. The disaster to the Norwegians, when their fate compelled them to fight on shore, appears in the Scots chronicles as the battle of Largs, fought on the 2d of October in the year 1263; and it is not wonderful that the chroniclers, writing long afterwards, exult over it as a great victory. The shattered remnant of the Norse fleet had to work round the Mull of Cantyre, and then along the west coast, still tormented and suffering losses by foul weather, until they reached the Orkneys. There old King Haco died, on the 12th of December 1263.

In death the old Norse king was true to the spirit of his race, though Christianity had released the victim of un-violent death from the dismal eternity to which the old Norse creed consigned him. When he felt the hand of sickness on him he went to the church of St Magnus, then newly built, and one of the wonders of the age, and walked round the shrine of its martyred founder. Indeed, in all things he did his best to follow the precepts of his spiritual advisers; but the legends of old battle-fields got the better of the legends of the saints. He had read to him first the

Bible, then the Lives of the Saints ; but at last he demanded to have read to him day and night, while he was awake, the chronicles of the Norwegian kings, from Haldan the Black downwards.

Throughout the information we possess of Haco's expedition, it is clear that little preparation was made by the Government to meet it. There is no notice of any muster of the crown vassals. We hear of no naval encounters, although Scotland possessed ships. It is probable that these were insufficient to operate to any good effect against the mighty sea force of Haco, and that the best to be done with them was to keep them out of danger.

Largs was indeed not a spot where a deliberate invasion of the country could well be expected, since it is extremely ill suited for troops forming in strength after landing. Elsewhere to the right and the left there might perhaps have been found navigable sea coming up at high tides to level ground ; but here there is a narrow strip, with bluffs running right up from it. Troops marching along the strip in either direction would be flanked from the higher ground for many miles ; and the alternative of passing through any of the narrow clefts which pierce the range of hills would have been still more perilous.

We hear in the earlier accounts of no commander to the Scots force, nor is it recorded that any of the great feudatories of the crown were present. This silence is made emphatic by the eminence given to the rank and splendid equipments of Sir Pierce Curry, the only man whose name can be absolutely identified on the Scots side at the battle of Largs. The force seems, indeed, to have been a miscellaneous gathering of the peasantry, and as such it affords a forecast of that armed power which the country afterwards showed itself so capable of animating into life in time of need.<sup>1</sup>

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<sup>1</sup> In the absence of any other detailed account of this expedition, it is necessary either to pass it rapidly by as an unexplained incident, or to found on a little book called "The Norwegian Account of Haco's Expedition against Scotland, A.D. 1263, now first published in the original Icelandic from the Flateyan and Frisian MSS., with a literal English version and notes by the Rev. James Johnston, A.M." 1782.

It was natural that an event such as the battle of Largs should in the popular chronicles of later times find a place with the ravages of the Norse invaders of four hundred years earlier. The silence of the narrative, due to the later date of the events, only served to give emphasis and distinctness to a class of historical events too vague in the accounts of the older records. Here indeed was the last of the outrages from the Viking freebooters. As it was the last, so it was the greatest, and it met a fate that for ever kept the coast of Scotland safe from the incursions of the sea-robbet. Many monuments on the west coast belonging to the class called Druidical seemed to commemorate the event, and suit well in their character as memorials of the burial of "the heathen Danes" who fell in their last outrage. Among these a cromlech on a rising-ground near Largs appropriately served as the monument erected over the body of King Haco, as killed in the battle.

When the elements had freed the country from its peril, the king sent a great force against the island potentates, now at his mercy. The Scots chronicles, as a supplement to the victory, tell us that severe vengeance fell on the island chiefs who had in any way countenanced the invader. Severity and cruelty were too much the order of such occasions. These chroniclers, however, writing long afterwards, required such results to supply the moral to their view of the conduct of men who are denounced by them as perfidious traitors to their king and country. To add another picturesque touch to this view, it is told how old Haco, when death approached him, believing it incumbent on him to leave behind the means of visitation on such wickedness, sent to King Alexander the letters inviting his descent, which he had received from those treasonable subjects.<sup>1</sup>

This disaster was a blow keenly felt in Norway as a diminution of power. Three years afterwards, in 1266, Magnus IV., the new king, by formal treaty, ceded to the King of Scots Man and all the Western Isles, specially

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<sup>1</sup> See the *Scotichronicon* and *Wyntoun*.

reserving Orkney and Shetland to the crown of Norway. On the other hand, the King of Scots, in consideration of the powers or claims ceded by the crown of Norway, agreed to pay down a ransom of a thousand marks, and an annual rent of a hundred marks. There was no stipulation for homage or any feudal ceremony on the occasion.<sup>1</sup> In the year 1281 a bond of amity was established between the crowns by the marriage of the Scots Princess Margaret to Eric of Norway.

There were some secondary troubles in this reign connected with the adjustment of the independent rights of the Scots Church. In the rescript already spoken of, in which Pope Innocent IV. refused to comply with the demand made on the part of England about the crowning of the King of Scots, he also declined to authorise King Henry to draw the tax on benefices in Scotland, with the remark that such a claim by one prince on the dominions of another was unknown. In 1254 Innocent IV. granted to Henry a twentieth of the benefices in Scotland on condition of his joining the crusade. The arrangements for the disposal of the money to be thus raised were so shifted and adjusted from time to time, as to show that the Court of Rome held this to be a fund entirely at its own disposal. The money, however, though it seems to have been partly collected, was not permitted to cross the border. The king and the clergy were at one on this point, and had a practical excuse for the retention by fitting out a small expedition of Scots knights, who joined the crusade, from which none of them returned.<sup>2</sup>

A taxation of Church livings involved a rating of their value: and it is found that such a rating had been made, in part at least, as early as the reign of William the Lion. When the taxation of lands comes up for consideration, there arises a natural dispute if the value of the lands has

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<sup>1</sup> Robertson's Index to the Charters, 101.

<sup>2</sup> One of these, the Earl of Carrick, left a widow, who, by her romantic marriage with the son of Bruce, the competitor for the crown, became the mother of the great King Robert.

risen since the latest preceding valuation was applied. If there be an old recorded estimate of value, it is the interest of the payer of the tax to hold by that estimate, of the receiver to have a new survey. In 1275 there came to Scotland, commissioned from Rome, Boiamund de Vicci, commonly called Bagimond. His errand was to collect the tenths of benefices, and to have them rated according to their existing value. The Church stood tenaciously by the old practice, and prevailed on the Papal agent to return and represent their case at Rome. Whether his representations were earnest or not, they were not successful. He returned and completed his valuation. It was a permanent record, known as Bagimond's Roll, and was the foundation of ecclesiastical taxation down to the Reformation. It has been remarked that, whether from imperfect collection or some other cause, the Court of Rome profited little by the new valuation, and that it made but a trifling addition to the amount that would have been collected under the old practice. The subsequent history of Bagimond's Roll is as instructive as its precedents on the distaste of a progressive country for new valuations. After a time, the demand ever was to tax upon the valuation in Bagimond's Roll—not the existing value; and thus, centuries after the time when it had been resisted, both as a heavy tax and a badge of subjection to Rome, it was cherished as a vested privilege of the Church in Scotland.<sup>1</sup>

There were other ecclesiastical difficulties, but they were not of magnitude, and ended well for the indepen-

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<sup>1</sup> A valuable inquiry into the question how far we have existing evidence for the contents of this roll, along with an inquiry into the amount first realised under it, will be found in the preface to the *Statuta Ecclesiæ Scoticanæ*, p. lxx. *et seq.* "The whole amount received in the three years beginning with the Feast of the Nativity of St John the Baptist, 1274, was £7195 sterling, or, on an average, £2035 a-year. This would not represent a yearly value of more than £20,350, being an increase of only £1688 on the yearly value, shown by the *Antiqua Taxatio*." See also *Origines Parochiales*, pref. xxxiv.

"Boiamund died before the collection of the tax was completed. The gathering in of the arrears was intrusted to certain merchants of Florence, Sienna, and Lucca."—*Ibid.*

of Scotland in earlier ages. They are, in great measure, adaptations from the English ecclesiastical laws. So much about the date of this code is known that in its complete form it cannot be so old as the year 1237, yet must have been in existence before the year 1286.<sup>1</sup>

Few states could, in that age, look forward to a more serene and prosperous future than Scotland after the battle of Largs. A son was born to the king—the chroniclers have it that he was told this on the day when he got news of Haco's death. Ere he was yet forty-four years old, with two children and a grandchild, he gave a tolerable promise of undisputed succession. A dangerous enemy was humbled and thrown to a distance, and the English claims seemed a vision of the past. The fate of nations, as we have seen, had come to depend, more than of old, on genealogical conditions, which dictated the succession to royal houses, insomuch that the events which plunge a family in grief might also be a real calamity to a people. A succession of such calamities followed close on each other. In preparation for them we may count the death of Henry III. in 1272 as a calamity, in that it bequeathed the opportunities offered by the others to a spirit so capable, vigilant, and remorseless as that of Edward I. King Alexander, who was of like age with his brother-in-law, got over successfully any difficulties about homage at the coronation, exempting his right as a free sovereign from his obligations, and all went smoothly for ten years;—so at least it appeared upon the face of history. Nothing comes up in the course of public known events to disturb or alarm Scotland about the designs of the English king; but there is a small entry in the English records in the Tower which afterwards did disturb the champions of national independence, and create hot discussion in the great literary war about the homage question. There is a transcript of a Close Roll of the sixth of Edward I. (1278),

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<sup>1</sup> Preface to *Statuta Generalia*, liv. This code, which first appeared in the *Concilia* of Wilkins, to whom it was supplied by Ruddenman, was reprinted by Lord Hailes in the third volume of his *Annals*. The authoritative version will now be that of Robertson's *Statuta*.

recording that the King of Scots came to Westminster to proffer his homage. We are thus prepared for the method of the homage, limited or unlimited, and are told that it was complete and comprehensive.<sup>1</sup> It could only be said that this was the English version of the affair, which could not be justly pleaded to the prejudice of Scotland. A zealous Scot, however, determined to see with his own eyes if it were so written in the bond, found that the passage had been inserted on an erasure. It was thus evident that the roll originally contained something which it was desirable to replace with something else.<sup>2</sup>

It happens that a scribe of one of the oldest of the Scots monasteries, as if to guard against any such treachery, kept a note of the precise form of the ceremony of homage and of its conditions. These, according to his sense of them, were very emphatic:—

"In the year of God 1278, on the day of the Apostles St Simeon and St Jude, at Westminster, Alexander, King of Scots, did homage to Edward, King of England, in these words: 'I become your man for the lands which I hold of you in the kingdom of England, for which I owe you homage, saving my kingdom.' Then said the Bishop of Norwich, 'And saving to the King of England, if he right have, to your homage for your kingdom;' to whom the king immediately answered, saying aloud, 'To homage for my kingdom of Scotland no one has any right but God alone, nor do I hold it of any, but of God.'"<sup>3</sup>

While such weapons of contest were preparing in the recesses of cloisters and record-houses, troubles more palpable and public were at hand.

In 1283 came the news that the king's daughter, Mar-

<sup>1</sup> "Et illud ei fecit in hæc verba: 'Ego, Alexander, Rex Scottorum, devenio ligius homo domini Edwardi, Regis Anglorum, contra omnes gentes.' Et idem Rex Angliæ homagium ejusdem Regis Scottorum recepit."

<sup>2</sup> Allen's Vindication, 87.

<sup>3</sup> "Cui rex statim respondit aperte dicens, 'Ad homagium regni mei Scotie nullus jus habet nisi solus Dominus; nec illud teneo nisi de solo Domino.'"—"De homagio quod fecit Alexander Tercius, Rex Scottie, Edwardo, Regni Angliæ, pro terris suis quas habuit in regno Angliæ;" Register of Danfermline, 217.

garet, Queen of Norway, had died, leaving a newly-born daughter. Within a few months the king's son, Alexander, married to Margaret, daughter of the Earl of Flanders, died also.

Here at once the country was in a sea of difficulties. We have seen that in England, rather more than a century earlier, the law of succession had not become so exact as to fix whether an heiress should succeed to the crown or should be absolutely excluded. Such a question was a like novel criterion of the rule of succession in Scotland. Had there been so near a relation as an uncle—a brother of the late king—to rest upon, there is little doubt that he would have succeeded Alexander. It was known that there were several expectants of the succession, but they were all distant collaterals. What was far more serious, however, they were all Norman barons, with possessions in England as well as Scotland. There was no doubt, although Norman names are then so conspicuous in great state transactions in Scotland, that there was a strong middle class, backed by a peasant and burgher class, who disliked the Norman intruders, and felt a horror of any subjection to a Norman government such as England had now been suffering under for two hundred years. To them it appeared that Scotsmen were drifting towards such a fate, with nothing at present existing but the frail child away in Norway to protect them. Whether it should be the English king himself, or one of those Norman magnates surrounding his throne, that was to rule, would make little matter; it would still be Norman rule.

Impelled by such a prospect, there was a determination at once to render the succession of the child as secure as it could be made. The Estates met at Scone so quickly after the news of the prince's death, that their resolution was made contingent on a posthumous child being born by his widow. Saving such an event as the king having children, it was resolved that the crown should go to the Princess of Norway.

Soon afterwards, in 1285, the king married Joleta, the daughter of the Count of Dreux. It happened that within a few months afterwards, the 12th of March 1286, he



chose to ride in the dark along the coast of Fife opposite to Edinburgh. Near the present burgh of Kinghorn he had to pass over a rugged promontory of basaltic trap. He was pitched from his horse over one of these rocks and killed. Such was the final calamity, opening one of the most gloomy chapters in the history of nations.

Within a month the Estates had met at Scone and appointed a regency to govern the kingdom in the absence of its queen. The formation of this body kept up the peculiarity that the country was divided into two communities by the Forth. Three guardians were appointed for the southern district, the old Roman province, and three for the northern, the Scotland that a century earlier had been bounded by the Forth as the Scots water. Each set consisted of a bishop and two barons. Of the northern guardians the Earl of Fife was murdered and the Earl of Buchan died, so that as ruler of that district there remained the bishop only, Fraser of St Andrews.

There was now much stir among the collaterals. The nearest male relation of Alexander was Robert Bruce, the grandson of Earl David. It has been seen that, more than forty years before, Alexander II. had arranged that if he died childless Bruce should succeed to the crown. He was then the only male representative of William the Lion's brother, Earl David; but there were now other male descendants, and even in the imperfectly-formed genealogical notions of the day that altered materially the power of his claims. Still he was in a position to indulge in high hopes, and showed a disposition to realise them if he could. He assembled his retainers and took an attitude of such decided menace that in the subsequent competition for the crown he was charged with rebellion against his queen by marching against her fortresses with banner displayed, and especially by assailing and seizing her castle of Dumfries.<sup>1</sup>

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<sup>1</sup> In Baliol's pleading of his cause before King Edward, of which hereafter, it is set forth that Bruce and his son, the Earl of Carrick, attacked the castle of Dumfries with banner displayed, and drove out the garrison. The record is imperfect, but it charges him with taking

Looking back upon this crisis through the light of events happening a few years afterwards, we find a very noticeable blank, though the Estates and others concerned in Scotland were probably unconscious of it. Here again the succession to the crown of Scotland opened to a minor; and if the King of England had been, as soon afterwards he said he was, the Lord Paramount of Scotland as a fief of the English crown, it was not only his right, but his feudal duty, to take on himself the management of the affairs of the fief. Further, it evidently should have been a serious matter for his consideration whether it was to be admitted that Scotland was so exceptional among sovereign fiefs as to be descendible to an heir-female. The lord superior had great interests at stake, and everything to say in such a matter. A superior with an heiress-vassal to

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common in old records, and provocative of curiosity. In a document in the chartulary of Dunfermline, a certain act of feudal investiture is referred to, and its date is identified by the day on which St Margaret's remains were removed to the high altar of Dunfermline (see vol. i. p. 381). To mark the event of removal, it is said to have been made in the presence of King Alexander III., seven bishops, and seven earls of Scotland—"septem episcoporum et septem comitum Scotiæ" (Register of Dunfermline, 235). In one of the chronicles, an attack on Carlisle by the Scots in 1296, to be afterwards mentioned, is said to have been made under the leadership of seven earls whose earldoms are given—Buchan, Monteith, Strathearn, Lennox, Athole, Mar, and Badenoch. "Quo tempore septem comites Scotiæ, videlicet de Bowan, de Moneteth, de Stradeherne, de Lewenes, de Ros, de Athel, de Mar, ac Johannes filius Johannis Comyn de Badenan, collecto exercitu."—St Alban's Chronicles, Rishanger, 156. Seven earls of Scotland were said to have been slain at the battle of Neville's Cross. Mr E. W. Robertson, in his *Scotland under the Early Kings*, has commented in his usual impartial spirit on Palgrave's discovery, and notices the old reference in the tract *De Situ Albanie* to the tradition about the seven provinces of Pictland (ii. 504). The mystery will probably be solved some day, and found to be very simple. Other parts of the world have been vexed by this "mystic number seven," as it is termed. The Saxon kingdoms were still called a Heptarchy when it is certain that seven was not their number. But everything in Britain must yield to the scale on which the mystic figure worked in Ireland. We are told how "the fact that Aengus was able to enumerate 141 places in Ireland where there were or had been *seven* contemporary bishops, seems to indicate the existence of an institution founded upon the mystical *seven* of the Apocalypse."—Todd's *St Patrick*, 35.

dispose of, had gained a prize in the feudal lottery which no ordinary man would neglect. A monarch who afterwards, as we shall see, was so punctilious in giving due weight to all rules of law and personal rights, might have been expected to look to all these things. It was not his policy, however, at that point of time, to proclaim himself the Lord Superior of Scotland, and none of the diplomatic documents to which he was a party give a hint of such a claim, though afterwards his scribes were careful to make frequent repetition of his title of Lord Superior in all documents which concerned Scotland. His designs were of a kind which required accomplices to complete them, and he waited until events gave him accomplices.

His first policy, however, rested on conditions fundamentally different from those with which he ultimately had to deal. He had then a secret intention divulged no further than was absolutely necessary for accomplishing the first steps towards it. He had, in fact; obtained a dispensation from the Pope to enable his son Edward to marry the infant Queen of Scots—they were cousins-german, and so within the prohibited degrees by the canon law.

So stood matters when King Eric sent to England certain commissioners or ambassadors. What urged him immediately to this step, or what he expected to gain by it, it is not easy to see, but it became the function of these representatives to look after the interests of the young queen. Edward asked the Scots regency to send commissioners to meet them. Four were appointed—the Bishops of St Andrews and Glasgow, with Bruce and Comyn. They had powers to treat, which excluded all acts prejudicial to the nationality and public interest of Scotland. Commissioners were appointed by King Edward, and the three commissions met at Salisbury. It was a vague conference. If the great secret of the designed marriage with the Prince of England was known to those present, no discussion on it appeared in their proceedings. It was promised for Norway either to send the young queen to Scotland, or to send her to England free of matrimonial engagements. For England something was said about the necessity for establishing good order in Scotland, and that

being accomplished, the young queen, if in English hands, should be transferred free to Scotland; but there was a condition of some significance, that security should be given that she would not be bestowed in marriage except by Edward's advice, and with the consent of King Eric, her father. The Scots promised the establishment of good order, and offered to remove any of the guardians who might be obnoxious to King Eric.

It seems to have been immediately after this meeting that the Scots heard of Edward's intention about the marriage, and it was discussed at a meeting of the Estates. Edward was besought by them to tell if this were true, in a shape which showed that they caught eagerly at the proposal; and with like eagerness they urged King Eric to send over their young queen. Edward must have admitted his project, for we find him assuring the Scots that he could use influence to make Eric send over the child, and he was urged to use that influence, since it appeared that her father was reluctant to part with her. It is clear that, whether wisely or not, the Estates thought that the chances for Scotland were better in a marriage of their queen with the King of England than might be, than in leaving the throne to encounter the dangers then in prospect.

Meanwhile they did their best for the protection of the country by a solemn treaty. It was accepted by the clergy, nobility, and whole community of Scotland, assembled at Brigham, near Berwick, on the 18th of July 1290. It provided that the rights, laws, and liberties of Scotland should continue entire and unviolated; the kingdom of Scotland was to remain separate from England, divided by its proper marches; no crown vassal should be bound to go beyond the boundaries of Scotland to do homage to a sovereign residing within England, but when necessary a commissioner should be appointed to receive the homage within Scotland; no native of Scotland was to answer beyond the marches in a civil cause, or for a crime committed by him in Scotland; no parliament was to be held outside the boundaries of Scotland to discuss matters respecting the kingdom; and lastly, among matters dealing

more with mere detail, one touched an important point. Care was taken that there should be an entirely national Great Seal, always to be held by a native of Scotland. There were stipulations of a general tenor, reserving all rights existing in the King of England or others as to the marches or elsewhere, and some have thought that these conditions virtually neutralised the whole. They would have gone for nothing, however, in any interpretation of the treaty, and its specific conditions were as strong a protection to the nationality of Scotland as parchment could create. King Edward himself afterwards certified in the strongest way its efficiency as a treaty, by requiring that Baliol, on obtaining the crown of Scotland at his hands, should cancel the treaty of Brigham.

King Edward's first act after the acceptance of the treaty must have startled the Estates. He sent Anthony Beck, the warlike Bishop of Durham, to act, in concert with the guardians of Scotland, and with the advice of the Estates, as lieutenant for Queen Margaret and her husband,—and this in order that he might be able to keep the oath he had taken to maintain the laws of Scotland. He next demanded the possession of royal strongholds in Scotland, on account of some suspicious rumours that had reached him. It is open to any one to maintain, and but for Edward's subsequent career it might have been plausibly maintained, that he was here influenced by a determination to protect the kingdom against the pretenders to the throne.

There was at that time written to King Edward a letter by the Bishop of St Andrews, which became memorable, and has to be referred to further on. The letter expressed gratitude for a message brought from King Edward, whence it is to be inferred that the king took graciously the refusal to give up the castles. The satisfaction from this petty success was, however, clouded by the rumour of an event likely to overwhelm this practical difficulty, and all others of its kind, in far more momentous issues. The rumour was confirmed, and it became known that the young queen—the Maid of Norway, as she was called—had died at Orkney, on her way to Scotland.

## CHAPTER XVI.

PROGRESS OF THE NATION TO THE WAR OF  
INDEPENDENCE.

TOPOGRAPHY—BOUNDARIES OF THE COUNTRY—THE PROVINCES—  
CAPITAL TOWNS—MINOR TERRITORIAL DIVISIONS—SHERIFFS—  
THANES—MAARMORS—PROGRESS OF FEUDALISM—OLDER LAWS  
FOUND IN OPERATION WHEN FEUDALISM BEGAN—THE FICTITIOUS  
CODES OF OLD LAWS—THE REGIAM MAJESTATEM—CRITICAL LITER-  
ATURE ABOUT IT AND OTHER EARLY LAWS—ACTUAL VESTIGES OF  
THE OLD LAWS—LOCAL CODES, LOTHIAN, GALLOWAY, ETC.—  
PECUNIARY MULCTS FOR OFFENCES—MONEY VALUE OF THE CITIZEN  
—COMPARISON WITH THE SPIRIT OF THE ROMAN JURISPRUDENCE  
—INFLUENCE OF THE SPIRIT OF NEIGHBOURLINESS AND COMMON  
RESPONSIBILITY—SPIRIT OF FAIRNESS AND HUMANITY—SPECIMENS  
OF ANCIENT LAWS—ORDEALS—BATTLE—RISE AND INFLUENCE OF  
MUNICIPALITIES—PROTECTION TO LIBERTY—NO MAGNA CHARTA, OR  
CHARTERS OF THE FOREST—SUCH PROTECTIVE CONCESSIONS NOT  
REQUIRED.

WE have now reached a critical period—it might be called *the* critical period—of our history. For some time to come every year has its own trouble in danger and contest; and when these years of trouble are over, the community emerging from them is different in many essential elements from the community upon whom they opened. The opportunity, therefore, seems suitable for casting a glance at the condition, so far as we can make it out, in which this period of difficulty found the country.

The history of the contests in the outlying districts has shown the difficulties which the authority of the King of Scots had in extending to certain territories in the north and the west, which, in the end, came under his rule. We

have seen how the term Scots was first applicable only to natives of Ireland; how it crossed the Channel, and included the descendants of those Irish who had settled in Argyle; and how, at last, the monarch ruling from the Tweed and the Solway northward was named the "King of the Scots." Still that was a colloquial expression, such as we use when we design the United Kingdom of Great Britain and Ireland by the word Britain, or England. The King of the Scots, when he issued his charters as a notification to all classes among whom he held rule, called them Franks and Angles, Scots and Galwegians. The Franks were the Norman settlers, and had become so numerous as to be a great element in the population. The Angles were the refugee families who had fled from Norman tyranny in England, and perhaps the whole population of the Lothians was so called. The term Scotia or Scotland at this time meant the country north of the Forth. This river, with its Firth, was called "the Scots Water," and Lothian and Galloway were as yet countries only united with Scotland under the same crown. Thus, among the earliest of the public laws—those attributed to William the Lion—there is a regulation by which an inhabitant of Scotland, making a seizure or distraint beyond—that is, south of—the Forth, must bring it under the notice of the sheriff of Stirling—spoken of sometimes as a town on the border of Scotland—and convey it to Haddington, where it may be redeemed.<sup>1</sup>

By the same old law, certain places are appointed in Scotia to which all legal writs should be returned, and these may be counted, so far as a declaration or regulation could make them, the local Capitals of their respective districts. They were—for Gowrie, at Scone; for the Stormonth, at Cluny; and for Strathearn, at Kyntinloch, now identified with the village of Kintillo on the river Earn, three miles from its junction with the Tay.<sup>2</sup> All these

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<sup>1</sup> "*Nemo de Scocia debet accipere namum ultra aquam de Forth nisi prius ostenditur vicecomiti de Strivelin.*"—*Assisæ Regis Willelmi*, xxvii.

<sup>2</sup> Kyntinloch was supposed to have stood where Perth now is. The

districts were in Perthshire, and showed that there the centre of Scotland proper stood. For the district of Athole, the central station was at Raib, now Logiehall, in Perthshire; for Fife, at Dalrymch, supposed to be Markinch; for Angus, at Forfar; for the Mearns, at Dunnottar; for Mor and Buchan, at Aberdeen; and for Ross and Moray, at Inverness.<sup>1</sup>

We find no decided tendency in any town or fortress to aggregate to itself the conditions of a national capital. The King of the Picts was said to have had his capital successively at Inverness, at Fort-Teviot, a few miles south of Perth, and at Abernethy, on the south bank of the Tay. The King of the Scots, while he ruled only in the west, is said to have held court at Innerleithly, or, as it is now called, Fort-William, while the King of Strathclyde had his at Alen or Dumbarton. But these are capitals only in the magnificent language of the chroniclers, which will accept of nothing less than an empire with all its parts complete, though dealing with a community which is but faintly articulated out of the general chaos. That the rulers of the districts occasionally frequented such places, is all that can be authenticated towards making them capitals.

As the state broadens and consolidates, these annalists are less apt to find a capital for it, because more is known of its actual internal organisation. Scone at Perth, where

identity of the place with Kintillo was suggested to me by more than one friendly correspondent. This village is interesting and peculiar, as still bearing marks of old importance. Instead of the usual Scots midland village, with its sordid cottages, slated or thatched, it is a short street of houses, considerable in size, generally with railed-off gardens or shrubberies. It is very like the old suburbs of villas that grew a few years after the union of the crown, when the fear of invasion from England no longer kept the affluent citizens within the walls. It is so often seen as to become almost a law, that when no serious disturbing element breaks in, the several buildings of a cluster are renewed from time to time on the old ground-plan. Hence it is likely that the present houses of Kintillo, though probably none of them is above two centuries old, carry down to us the aspect of a place of ancient importance.

<sup>1</sup> Assise Regis Willelmi, xiv.



the Stone of Destiny was kept and there was a favourite royal residence, bade fair to become the centre of government; but in wealth and importance it was exceeded by Berwick. Dunfermline was a favourite royal residence; and we find the king issuing his writs from Edinburgh and Roxburgh, and successively from various other places in which he sojourned for the time.

We shall have to deal farther on with the burghal communities, and the influence of their trade and special privileges in creating towns. We have seen something of the local divisions into dioceses and parishes, created by the progress of ecclesiastical organisation. There was another great local division, for purely civil purposes, into Counties, Shires, or Sherifffdoms. In England, the distinct partition between the several Anglo-Saxon kingdoms drew several strong lines of demarcation, which served as boundaries to counties. In Scotland, the counties, as they exist, became gradually marked off or articulated, through that aggregating force in the growth of feudal crowns already alluded to, which took shape in converting independent local potentates into representatives of the crown, or in setting down such representatives to exercise a joint authority with them. This was met by a counter-force equally feudal in its nature, by which the office of representative of the crown had a perpetual tendency to become hereditary, and so all but independent of central authority. The contest of these two forces makes great confusion in the early growth of sherifffdoms, which becomes mixed up with that of the feudal nobility. We have Thanes, Earls, and Counts—all terms in some measure synonymous with Sheriff, and all on occasion nominated by the crown; yet afterwards comes, as a new missionary to give effect to the royal authority, this same Sheriff or Shire-graff.

There came, however, to be this much of distinction between the sheriff and the other local dignitaries, that the sheriff, whether hereditary or not, was nominally the servant of the sovereign, and that all his official acts as sheriff were, or ought to be, for the benefit of the crown and the furtherance of government business. Further, while the territories over which the other local dignitaries

exercised authority depended on the extent of their own feudal rights of property or superiority, the sheriff's authority came to be determined by a fixed arbitrary limit—the boundaries of the Shire or County.

But even to this, as a general rule, there were exceptions; for special rights of sheriffdom over detached pieces of territory were conferred on families of powerful local influence. Others held Baronies, which conferred the right of holding courts of justice, with certain limited powers; or Regalities, which conveyed a like right with much higher powers. Taking in at a general glance the writs in which such judicial powers are dispersed among the leading families all over the country, a natural first impression is that the crown had profusely alienated to subjects the power and responsibility of administering justice. But in reality the process was ruled by another of the specialities of the growth of the feudal monarchy already referred to. The sovereign could not well help doing as he did, and the act conveying the power virtually restrained it within certain limits. The central power of the government was not yet strong enough to supersede that of the local magnates, and the crown conceding certain powers, which these consented to receive in full of all demands, was a virtual compromise.

It is scarcely more than putting in another form this estimate of the limited power of the crown to say, that there was not sufficient central machinery to transact the judicial business of the nation. The Chancellor does not appear to have yet become a judge. We hear of the Justiciars or Chief Justices—one, at least, for the territory north of the Forth, another for Lothian. The king sitting in the sort of supreme council, which we shall presently have to look at, did justice, but in great questions only. Among the fragments of King David's ordinances, one prohibits any of the lieges from bringing his plea before the king himself, unless he has first brought it before his lord, or the sheriff, or bailies having jurisdiction in the place; unless it be one of the great pleas of the crown.<sup>1</sup>

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<sup>1</sup> *Assise Regis Davidis*, c. 24; A. P. i. 10.

Hence out of necessary conditions arose what appeared to be a profuse and reckless distribution of local powers. Their utmost stretch was expressed when it was said that a hereditary jurisdiction extended to "pit and gallows." The one term probably expressed distinctly enough the character of the prison kept by the feudal lord, the other needs no explanation. In after-times, as the power of the crown enlarged, the tendency of the central government was to treat these seignorial powers as abuses, and to check or neutralise them when they could not be eradicated; but they had grown with the power of the crown itself, and became nearly as tough and indestructible.

Such seignorial rights were in many instances conferred on churchmen, as attached to bishoprics and to abbeys, or other monastic houses for the government of the domains attached to them; and here a balance was perhaps in some measure established against the pressure of the hereditary jurisdictions, the influence of which was met in another direction by that of the burghal communities.

The present is not a proper place for an elucidation of the minute particulars of this intricate articulation of powers and dignities, even if there were the means of accomplishing that task with precision. It must suffice to mention another and peculiar element which remained for some time after this period among the seignorial institutions of Scotland, that of Thanage. This is a well-known old Saxon institution, but better known than loved by all readers of Saxon history, from the intricacy and confusion besetting all attempts to define its nature. It was swept away before the strict Norman feudality of the Conquest, but it subsisted long afterwards in Scotland; and as the Scots thane was the contemporary of thoroughly feudal institutions, his nature and functions came to differ from those of the extinct Saxon institution, and thus added a new difficulty to the task of any one who might attempt to explain the dignities, powers, and duties of "a thane." The institution was special to the northern districts. We have seen how, in the north, a Maarmor appears to have struggled with the King of Scots for

an independent authority. In these districts there are found, as history dawns on them, chiefs of lower grade having the title of Toshachs. The Maarmor and these seem in some way, through the pressure of the crown, to have resolved themselves into an Earl of Ross, and certain thanes whose authority and rank were inferior to his. The earl, of course, had his title from the crown, and the thanes also were crown dignitaries — nay, it has been thought that, like the sheriffs, they were servants of the crown appointed to see after the feudal taxes and other crown interests in their respective districts. But supposing all this to be fully established, there is a mystery about these Scots thanedoms uncleared. The title being an innovation supplanting that of older local authorities, it is naturally supposed to have come from England with other southern usages when Queen Margaret and her followers flocked to the court of King Malcolm. Yet it is not in the southern districts frequented by these strangers, but far to the north and beyond the Grampians, that the institution is found in its vigour; and it is hardly a satisfactory reason for this to say that the strangers who flocked into Scotland were partly Norman and partly Saxon, and that the Norman institutions naturally established themselves in the south, and the Saxon in the north.<sup>1</sup>

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<sup>1</sup> “Rarely met with in the south, thanedoms are found mostly in Angus and Mearns and the northern shires down to the Moray Firth. We must not expect to find them in the fertile plains of the Lowlands, which were speedily and entirely occupied by the southern settlers, become feudal Barons; nor yet in the inner fastnesses of the mountains, where the Celtic institutions, unmodified, excluded the Saxon title or office. But along the borders that separated the races, along the southern foot of the Grampian hills, through the braes of Angus and Mearns, in the hilly skirts of Aberdeen and Banff, where the sovereign had established his dominion, imperfectly it may be, but had not driven out the native people, we find numerous thanes and lands held in thanage. In the narrow country between Findhorn and the Nairn we have four, some of them of very limited extent,—Dyke, Brodie, Moyness, and Cawdor. Archibald Earl of Douglas granted to his brother-german James of Douglas, the barony of Petyn, the third of Douf hous and Awasschir, and all the lands lying within the *Thaynedomeis* in the lordship of Kylmalaman (*Kilmalemak*) in the

Enough has been said, perhaps, to prepare us for viewing the Scotland of the latter part of the thirteenth century as a thoroughly feudal state; at all events, through all its authorised channels of announcement committed to the records, and so brought down to our present notice, the whole constitution was feudal. Customs antagonistic to feudality no doubt prevailed in the districts of the north, and in those chiefly inhabited by Celts. These customs were so tenacious as to have been troublesome within the memory of persons still living. But they had no place in acknowledged law or record; and if they showed themselves in action, and so disturbed the feudal harmony of the predominant system, history took no further notice of such collisions than to drop some judicious remarks about the suppression of insurrection and turbulence, and the firm assertion of the powers of the law.

Of the feudal system thus prevalent we can expect no account in any edict or code by which it was adopted. It had its commencement not in precept but in practice, and grew by degrees. The very supposition of its having been promulgated by any supreme power is illogical, since it created in its own growth the whole power of the state, from the king downwards. It would be interesting, if it were possible, to examine how it gradually superseded old forms of administration, whether Celtic or Norse; but though we might follow the advance of feudalism over the country with some approach to accuracy, what it displaced has left but faint and indistinct traces. In what may be called the Public Institutions we have scarcely a trace of anything Celtic. It is usually supposed that the reign of Malcolm and Margaret was the turning-point at which the court which had been Celtic became a Saxon

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sheriffdom of Elgin; confirmed by crown charter of James I. *a. r.* 21-1426. We meet with at least fifty thanedoms named in Scotch charters."—Innes's Sketches, 397, 398.

Here, and in Mr E. W. Robertson's Scotland under the Early Kings, App. N, will be found all the available learning on this troublesome point.

from the English book than to find one in Scotland. This theory was almost the reverse of compensation for the tradition of a purely national code which it displaced. There are critical reasons against it, too; and it is plain that the *Regiam* was put together by some unknown person soon after the War of Independence. The recollections of a long period of national popularity are now all that belong to this celebrated code, unless we may grant that the readiness with which it was received at an early day as the exposition of the original laws of Scotland, concurs with other evidence to show that it was not until after the War of Independence that the laws and institutions of Scotland took a direction of their own, which separated them by material fundamental differences from those of England.<sup>1</sup>

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<sup>1</sup> Everything critical and documentary for the study of the questions about the *Regiam* will be found in the first volume of the *Scots Acts*, edited by Professor Innes. There is some ingenious critical discussion, pointing to the very manuscript of *Glanville* which the *Scots* compiler may have used, resting on the following explanation as to a manuscript containing very early versions of the vestiges of old *Scots* laws, which was given to this country by the Canton of Berne: "The Berne Manuscript, which seems to have been in the hands of a person of consequence in the south of Scotland in the year 1306, contains a fine copy of *Glanville's* treatise, which in many of its readings varies slightly from the common manuscripts, and in some of these variations singularly coincides with the text of the *Regiam*."—Preface, 42. More effectual service is, however, done in this critical inquiry, and the whole question is in fact brought to a point by the printing of the parallel passages in the two works at length. The name of the *Regiam Majestatem* is taken from the words with which the collection begins, "*Regiam majestatem non solum armis contra rebelles in regnumque insurgentes oportet esse decoratum, set etiam legibus,*" &c. In the same strain the *Tractatus de Legibus et Consuetudinibus Regni Angliæ* begins, "*Regiam potestatem non solum armis contra rebelles et gentes sibi regnoque insurgentes, oportet esse decoratum, sed et legibus,*" &c. It may seem odd, that since the copyist changed the arrangement of the parts, as if to obviate recognition, he should have thus left so palpable a mark of plagiarism on the very face of his handiwork. But in fact this rhetorical flourish was the original property of neither of them. It is in each case an inflation of the celebrated exordium of *Justinian's Institute*, anticipating the sentiment, that "Peace hath her victories not less renowned than war" (*Imperatoriam majestatem non solum armis decoratam, &c.*) After supporting the echo of the proemium in a creditable

While there can be no doubt that the bulk of the Regiam is a mere adaptation of the English treatise, there are some other morsels incorporated in it which, by careful criticism, have been identified with laws that had existence, it is impossible to say how long, in local usage. There are external traces of such consuetudinary laws limited to districts where they may have grown before the King of the Scots had any concern with them. He obliged himself to respect the special customs of the Lothians—probably more thoroughly Anglo-Saxon in their character than any of the other provincial codes. The special laws of Gallogway long remained as exceptional privileges.<sup>1</sup> There was a condition that a native of that country, taking the benefit of the ordinary laws of the realm, was not also to plead his special privileges as a Galwegian. Among the fragments of the laws of King David is one enjoining that when the brethren of Melrose are on the track of the dis-

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parody to its end, Glanville and the Justinian Institute suddenly part company. Thenceforward they exemplify effectually the absolute contrast of the systems of the civilians and the English common lawyers. The Institute, as conveying the spirit of the Roman law, professes to examine the whole field which that law, as the law of the civilised world, occupies, and to divide and subdivide its matter by strict analysis. The English Chief Justice gets at once into practice; he goes over the various forms of procedure for the enforcement of the common law as if he were the officer who had to give effect to the decisions of the courts; and if he explains the matter of the law itself, it is by way of note on the machinery for putting it in execution. To carry out its philosophical division, the Institute is divided into four books: the first treating of persons in their relation to the law; the second, of things as they may become the objects of legal conditions; the third, of the mixed relations of persons and things through succession, contracts, and the like; and the fourth treating of legal remedies for the enforcement of rights by effective process. Glanville's treatise, which in reality is restricted to this last division, professes no arrangement, but is distributed over thirteen books, according to a division little more than arbitrary and for convenience of length. It is curious, however, to observe that the compiler of the Scots Regiam divides the matter into four books; and although he does not aim at any philosophically exhaustive division, it may be inferred that he was acquainted with the Institute, and adopted its four books as a canonical division for any code of laws.

<sup>1</sup> "Galwydia quæ leges suos habet speciales."—St Regis Alex. II., xiv., anno 1244.

covery of robbery, then the lord of the soil shall help rather than hinder them. The possessions of the rich abbey had no doubt many temptations, and especially to men peculiarly inaccessible to the usual administrators of the law.<sup>1</sup>

In some of the oldest records of actually adopted laws—those of King David's reign, for instance—there are references to previous laws or institutions, which are spoken of as if they were venerable customs known to every one. When a man is challenged for theft, and can find no one to be "broch" or bail for him, he is to be taken into custody, to be dealt with according to law and custom.<sup>2</sup> In another law, putting a poor and helpless person who is pillaged under the special protection of the sovereign, the sufferer is to make oath of the injuries done to him on the holy altar, as the practice is in Scotland.<sup>3</sup>

In the Regiam there are some fragments of a mysterious old code, called the Laws of the Brets and Scots. In the ordinance of King Edward already referred to these are denounced; and it is one of the reasons, and a sufficiently conclusive one alone, for holding his commissioners not to be the authors of the Regiam, that these denounced laws make their appearance there. In Edward's ordinance, the laws of King David, and the amendments of later kings, are to be the foundation of the new code, whence it is to be inferred that these were in harmony with the English laws, as indeed we otherwise know that they were; but the customs of the Brets and Scots were specially excluded from the materials out of which the new code was to be digested. Thus, in fact, the laws older than the period of Norman or English influence are denounced, while the more recent laws, stimulated by English influence, are recommended for preservation and improvement.

<sup>1</sup> Legum Dav. I. Vestigia (A. P.), 81.

<sup>2</sup> "Qualis lex et consuetudo est de homine sine plagio."—Ass. Reg. Dav., xvii.

<sup>3</sup> "Super sanctum altare, eo modo quo mos est in Scotia."—Ibid., xxx. In other sentences it is "contra assisam regni," "secundum assisam terræ," &c.—See Pref. to Statutes, i. 30.



A denunciatory criticism of so practical a kind naturally excites our curiosity about the tenor of these venerable customs. If what we possess of the "*Leges inter Bretones et Scotos*" be all that ever existed, that code must have had a limited range. The only thing dealt with is the pecuniary retribution for slaughter or personal injury. We have first the "*kro*," "*cro*," or "*croo*" of each class in the social grade. The *kro* appears to be an estimate of the absolute value of the person; the fixing of his rank in the pecuniary scale, to the effect that the damage to be paid for any injury inflicted on a person in any one of the grades, shall bear the same proportion to the damage for the same injury inflicted on a person of any other grade which the *cro* or total value of the one bears to that of the other. From this valuation table the king is not exempt. His value is estimated at a thousand cows, or three thousand golden "*ons*," translated shillings, bearing the inference that a cow was then worth three of these. The *cro* of a king's son, or of a Comes Scotie, Yarl, Maarmor, or by whatever other vernacular name known, was seven times twenty cows and ten—the method of expressing the round number of a hundred and fifty. The *cro* of the son of a Comes, or of a Thanus, was a hundred cows. From this we see that the thane was inferior to the comes. Besides the son and nephew of a thane, we have the Ogtiern, supposed to express the rank held by the fourth in descent from a thane.<sup>1</sup> This value, specially expressed in a mixed medium, is forty-four cows, with twenty-one denarii, and two parts of a denarius.

The code proceeds to a few details, not easily to be rendered with satisfactory distinctness, for adjusting the proportions of the *cro* to be paid for certain injuries. That general characteristic of the document which made it offensive to Norman taste is that, according to a practice very prevalent in the old laws of the north, it deals with crimes of violence only as affairs for pecuniary settlement. No doubt a code providing no other remedy against crime would be considered very barbarous at the

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<sup>1</sup> Robertson's *Scotland under the Early Kings*, i. 240; ii. 261.

unshapen germs in the prevalence of Compurgation. The accused is "assoiled" or cleansed if his neighbours stand by him and hold him to be innocent. There is great practical influence given to the broch, pledge, or bail, by which one citizen becomes responsible for another. Throughout there is scope given to the neighbourly spirit—the influence which the opinion of a man's fellows is to have upon his destiny, so that it shall not be entirely at the mercy of some great lord or royal officer, as in a purely despotic country.

In the laws specially attributed to King David, the purgation comes nearer the shape of a jury. In the very serious case in which the king pursues a man on a charge of felony, or for forfeiture of life or limb, he is protected or acquitted by the oath of twenty-four leal men abiding within the sheriffdom.<sup>1</sup>

If one charges another with reft or theft, and the accused asserts that the accuser did not possess the wherewithal which he maintains to have been taken from him, he may go to the country or the neighbours on that fact, and if the decision be in his favour he is acquitted.<sup>2</sup> So also if one is claiming damage for the slaughter of a relation, or the burning of his house, the other may get the judgment of the faithful men of the court on the question whether the amount claimed is or is not excessive.<sup>3</sup> A little later, in a statute of Alexander II., a person accused of theft or robbery may throw himself on the judgment of the neighbours.<sup>4</sup> In one of David's laws, four lines long, there is an alternative given to one accused of theft: he may offer battle, or throw himself on the purgation of twelve faithful men.<sup>5</sup> No one will stand up for the former of these alternatives as a rational law worthy of living into our own

<sup>1</sup> *Assisa Regis Davidis*, xi.: "De feloniam vel de vita et membro." The conjunction is not logically expressed. The acquittal is, "Per sacramentum viginti quatuor hominum legalium."

<sup>2</sup> *Ibid.*, vi.: "Proportatio patrie vel visneti."

<sup>3</sup> *Ibid.*, vii.: "Per viros fidedignos curia."

<sup>4</sup> *Statuta Alexander II.*, vi.: "Proportatio visneti."

<sup>5</sup> *Assisa Davidis II.*: "Utrum velit duellum vel purgacionem duodecim fidelium hominum."

birth could only challenge his fellow. To remove some inconveniences caused by these restraints, there was a remedy which enabled the man of higher rank to fight by deputy.<sup>1</sup> This does not carry commendation on its face, yet it worked itself afterwards into an established organisation of the English administration of justice. The peaceful spirit of municipal life begins to show itself at this early period in the restraints on the ordeal of combat in the burghal code. To prohibit it altogether would have been too radical a measure, and might indeed have compromised the rank taken by the burgesses. It does not appear that the burgesses dwelling within any town were restrained from the combat with each other. If a rusticus, having a right of burgage within a town but not dwelling there, challenged a resident burgess, the burgess was not bound to fight; but if he in his turn were the challenger, the non-resident burgess required to accept the combat. When an upland man not connected with the burgh challenged a burgess, the burgess was not bound to fight, unless it were either on a plea of treason or a question of "theme" or thralldom. Any way the burgess must not fight with the upland man save outside the burgh.<sup>2</sup> In the laws of the guild brotherhood of the great city of Berwick there are careful regulations for the suppression of strife. A blow with the hand was punished with the fine of half a mark. Where blood was drawn the established fine was twenty solidi, and such damages as the brethren might award to the wounded man. It was made penal to carry a pointed knife within the bounds of the guild.<sup>3</sup> Another spirit influenced the laws of the borders by which the brethren would have to settle with their neighbours of England. No testimony of witnesses was available to an Englishman in Scotland, and if his claim was disputed it could only be tried by the body of man.<sup>4</sup>

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<sup>1</sup> Stat. Alex. II., viii.

<sup>2</sup> Leges Burg., xi. and xii.—In the vernacular translation: "The burges may nocht fecht upon na man that wonnys on the lande bit he ga first ututh the burgh."

<sup>3</sup> Statuta Gildæ, 7 and 8.

<sup>4</sup> "Per corpus hominis."—Consuetudines Marchiarum.

Scattered throughout these rough old laws are occasional uncouth touches of compassion or fair play. The gallows we find in use ; but in the very beginning of a set of laws attributed to King David is one which shows that the hangmen of the age were not expert. If the thief brought to the gallows escape with his life the first suspension, it is not to be repeated, and he shall thenceforth be quits with the law, and not liable to punishment for his past offence, while those who so blundered his hanging are liable to a heavy fine.<sup>1</sup> This is in the true Anglo-Saxon spirit, which, down even to this day, loves to give to the criminal as well as to the hunted fox, what is called "law," by encouraging any legal difficulty that may enable him to distance his pursuers. Where criminals were caught in the act—the thief "backbearand," or carrying his plunder on his back, the murderer "red-hand"—summary justice was administered ; everything was then clear, and there was no occasion for those vexing and perplexing arrangements about compurgators, or the vote of the neighbourhood, which made the clumsy protection of the innocent.

The animals at the present day peculiar to the farm were the staple element of movable wealth in these early days, as we have seen by their use as a measure of value in retribution for offences. Among the laws attributed to the reign of William the Lion is a very characteristic division of the crime of stealing such stock, into a higher and a lower grade. When the prey requires to be driven, it is of the higher ; when it can be carried off, the lower offence is committed. In the vernacular translation the law is called "Byrthen-sack," in reference to what one may carry as a burden ; and declares that no man should be hanged save for what is equivalent to the value of two sheep, each worth sixteen pence. If one is arraigned for the theft of a calf or a ram, or as much as he may carry on his back, let him be tried at the court of the lord of the land, where he ought to be beaten or have his ear cut off in the presence of two leal men.<sup>2</sup> Many years have

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<sup>1</sup> Assisæ Regis Davidis I.

<sup>2</sup> Assisæ Regis Willelmi, xiii. : "Debet verberari vel auriculam ab-

not passed since English lawyers might have found in this a rebuke on the statute which made it death to steal five shillings' worth in a dwelling-house.

The distinction established in the old Scots law explains itself at once; it separates the masterful riever, who enters upon the land with a force and drives before him the cattle or sheep, from the paltry thief who takes what he can carry off. There is a converse to this, in laws for the special protection of the poor from such masterful depredators; and this also is characteristic of the spirit of kindness and fairness that, however clumsily it be adjusted, is found here and there in the remnants of our old laws. Thus there is one among the laws of David's reign giving a special remedy to poor people and friendless, who complain that anything is stolen from them or reft by the strong hand. The authors of such laws have a notoriety for good intentions ill effected, since the original poverty and feebleness which they are designed to protect will ever be in the suitor's way, let the remedy be as simple as it may. Perhaps the remedy in David's law was as good a one as could be devised. If the poor man oppressed had a respectable witness to swear to the truth of his charge, his plea became the king's plea, with all the prerogative pri-

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scindi." In the vernacular it is : "The theyff aw to be weil dungyn or his er to be schorn. And that to be done there sall be gottyn two lele men. Na man aw to be hingyt for les price than for twa scheip of the quhilkis ilk ane is worth xvid." At a later time comes a more detailed legislative measure for dealing with the being who is still the great difficulty with all penal legislators—the incorrigible thief. Probably the man who drew the following Act believed that he had solved the difficulty : "Giff ony be tane with the laff (loaf) of a halpenny in burgh, he aw throu the toun to be dungyn. And for a halpenny worth to iiij penys he aw to be mar fayrly dungyn. And for a pair of schon of iiij penys he aw to be put on the cuk stull and efter that led to the hed of the toune and thar he sall forsuer the toune. And fra iiij penys till viij penys and a ferding he sall be put upon the cuk stull and efter that led to the hed of the toune, and ther he at tuk hym aw to cut his eyr of. And fra viij penys and a ferding to xvi penys and a obolus he sal be set apone the cuk stull and efter that led to the hed of the toune, and ther he at tuk hym aw to cut his uther eyr of. And efter that, gif he be tane with viij penys and a ferding he that takis hym sall hing hym."—*Fragmenta Vetusta*, ii. t. 364.

vileges attaching to a royal suit; and it might stimulate the proper officer to its prosecution, that the rich man who was proved to have committed masterful rief on the poor and friendless under the royal protection, had to forfeit to the king eight cows, in addition to the restoration of the poor man's goods.<sup>1</sup> We have here the germ of the functions of a public or crown prosecutor in his protective capacity, and before his office was formed on the model of the despotic institutions of France.

We shall perhaps best appreciate the new spirit of humanity and personal freedom which dawns through these primitive laws, by looking for their equivalents in that great fountain of jurisprudence on which all civilised nations have drawn—the books of the Roman law. These are the perfection of human workmanship for the accomplishment of their ends. So comprehensive was the survey of these jurists of the Empire, so acutely and ingeniously did they fill in all the details of their vast system, that they seemed to have predicted and provided for every case of dispute between man and man; and the communities of the modern world, when practical difficulties arose from time to time, could always find their solution somewhere in the Justinian collection, and were content with what they found. But the student of social science will look in vain in that mighty system for any light on the principles of punishment and reformation—for almost any effective hint on penal law; those branches of jurisprudence which have tried the powers of the hardest workers and deepest thinkers of modern days. The Romans did not require to extend their sagacity and subtlety to these matters. All the inextricable difficulties of dealing with degradation and misery were cast into the great institution of Slavery. The people of the degraded and dangerous

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<sup>1</sup> Assisa Regis Davidis, xxx. : "Si concedendo veraciter confirmaverit quod ab eis sine lege et iudicio per vim aliquid abstulit reddat quod abstulit, et regi octo vaccas pro transgressione emendet." The preamble in the vernacular version is expressive : "It is ordanyt at al thai, the quhilkis ar destitut of the help of al men, quhar so ivir thai be wythin the kynrik, or besily aw to be, sal be undir the proteccioun of the lord the kyng."

classes were made articles of property, and the state had no further concern with them, save to adjust the principle of their ownership, and the responsibility of each owner towards his neighbours for the acts of his slaves.

The people of condition in early Scotland had their thieus, thralls, or serfs too; but it may be said that, while the institutions of the Empire ever tended to the strengthening and enlarging of the organisation of slavery, the tendency in Scotland was towards the absorption of the bondsmen into the free community. From the beginning, the laws giving a title to possession of the serf are indistinct, and they seem never to have approached the perfection of the best slavery laws, in converting the human being into a chattel without privileges. The nomenclature applicable to the class is indistinct; Thieus, Thralls, Bondmen, Serfs, Natives, Rustics, and Ceorls being employed without a meaning that can always be distinctly separable. Some of these classes could not act as compurgators or jurymen, but they could not be condemned without some trial by the country. The question whether a person was a bondsman or not was one of the high pleas that must proceed on a brief from the crown. The lord was the protector of the serf as well as his master, and was bound to this obligation in a practical form, which fits curiously into a system of pledges and neighbourly support pervading these old laws. If a serf were accused of an offence, and his lord refused to be his broch—that is, to be bail for his appearance—then, if he were acquitted of the charge, he was no longer bound to his lord, but became a free man.

The most significant, as it must have been the most efficient, of the emancipation laws was common to England and Scotland—that if a bondsman continued a year and day within a free burgh or municipality no lord could reclaim him. In Scotland the same appears to have been the effect of living for seven years peaceably on any man's land—acquiring what would be called an industrial settlement.<sup>1</sup>

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<sup>1</sup> These specialties stand chiefly on the *Regiam Majestatem* (ii. 8

Such a rule was likely to play into another in the laws of Alexander II., which gave redress in the king's court, by the justiciar or the sheriff, to any man whose lord arbitrarily deprived him of his holding. His possession of the holding could be proved by the true men of the country.<sup>1</sup>

In later times, an inquest or jury sitting on such a question would look to written titles. In Alexander's time, unless in important cases of formal feudal investiture and performance of homage, there would be nothing to establish the peasant's holding, save the testimony of neighbours that the family of the ejected peasant had ever, as far as was known, been possessed of the holding, or perhaps the recollection to that effect of the true men themselves. We may here see one out of apparently a number of shapes in which the thrall, bond-man, or serf, not being one of a caste condemned to slavery, might by degrees find a heritage of freedom for his race. Through the favour of accidents which have relieved him from strict violence, he has lived seven years on the estate of a man who has perhaps found him useful. He and his family there abide for a generation or two; and then, if the lord of the soil desire to eject his descendant, it is found that the family have an established right to their holding.

The general tenor of what we know about the institutions of the country is, that, excepting the more ancient fragments, they were in spirit the same as the English. Being so, they could not help partaking of the feudal institutions brought in by the Normans—but they had less of these than England had. The leaning in Scotland was more towards the Anglo-Saxon portions of what England had than towards the Norman. We have seen that the Normans had not planted their castles in Scotland, and they did not plant their language. In Scots documents

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<sup>1</sup> "Per probos homines patriæ."

punishments falling to the lot of the slayer of the king's deer in England, and that they dealt only with pecuniary mulcts. In the seventeenth century, when the crown lawyers made a diligent search for every scrap of parchment which could justify arbitrary prerogative rights in the crown, a code of forest laws declared to be of great antiquity was produced. It was afterwards found, however, on examination, to be a compilation of recent times—times coming down to the period of parliamentary action, when every new law binding upon the people required the sanction of the Estates. It was, in fact, after the manner of other received national codes, a mere compilation from the English forest laws.<sup>1</sup> Of the influence and action of any real forest law existing in Scotland we have thus scarcely a trace. One who had read a greater heap of existing writings about Scotland than any other man of his day, hence said: "The kings were the great hunters, in imitation of the Norman monarchs of England; and they had in every shire a vast forest with a castle for the enjoyment of their favourite sports. The king had for every forest a forester, whose duty it was to take care of the game, though we hear little of the severity of the forest laws in Scotland."<sup>2</sup>

Hence there is a very picturesque chapter in British history in which Scotland holds no part—the story of the outlaw Robin Hood and his merry independent band, who held their own in the free forest, defying the mail-clad tyrant in his castle. Every one is familiar with the fine Saxon spirit thrown into this group. They have little respect for the great feudal lord, his laws, and his property; they will take his life upon occasion, and are in the eyes of his law the greatest of criminals, yet are they full of courtesy, loyalty, and kindliness; they scour the forest at their will and feast on the deer; they delight to rob its lord and subject him to all contumelies, yet a priest or a forlorn wandering maiden is safe among them. The slain deer are distributed to all who need, and the fruit of rob-

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<sup>1</sup> See *Leges Forestarum*, Scots Acts, i. 323.

<sup>2</sup> Chalmers's *Caledonia*, i. 765.

bery is given to the poor. In the mere creature of popular legends we are not likely to find a parallel with the history of a great military leader and statesman, yet it is interesting to observe how like the Robin Hood of the English is to the legendary Wallace of Scotland. They are especially alike in each marking local peculiarities by his popular name. England is covered with such recollections of her outlaw—Robin Hood's Bay, Robin Hood's Chair, Robin Hood's Bed, Robin Hood's Wells, Robin Hood's Leap, and the like, all putting a mark on peculiarities in local scenery. It is the same with Wallace in Scotland; and in both the commemorations it is easy to see that this tenacity of popularity is founded on traditions which had their origin in great wrongs and deadly hatreds. In England these began with the Norman conquest—in Scotland they began with Edward's invasion.

Recurring to the faint vestiges of anything in Scotland resembling the English forest laws, it deserves mention that in late years a great territorial lord, endowed with something of the Norman spirit of monopoly in sport, did some service by trying how far prerogative forest laws, if they ever existed in Scotland, could be put in force. Whatever they were, they had not been checked, as in England, by guarantees like the Charters of the Forests; such as they were, they were unrepealed. He maintained that he was bound to plead the prerogatives of the crown, since the land he held was a royal forest, committed in a manner to his care, so as to throw on him a special responsibility for the protection of its immunities. He maintained two prerogatives: one was the right to close all communication through the forest between two districts of country; the other was a right to enter on the lands of neighbouring proprietors and reclaim from them the deer which had strayed from the royal forest. The courts of law found that there was no distinct law to support such claims—virtually they found that there was no old Scots forest law, and no restraints on personal freedom and the free use of property otherwise than by statute. It is significant that the chief support sought for the prerogative

side in these litigations, was something said by Lord Stair, a lawyer trained in the high prerogative school of Charles II.'s reign.<sup>1</sup>

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<sup>1</sup> *Athole v. Macinroy*, 28th Feb. 1862, reported in the case books. Among the views given out from the Bench were : "Lord Braxfield, a great feudal lawyer, observed,—‘ In Scotland, wild beasts being *feræ naturæ* were not the property of the crown ;’ and in the well-known case of the Earl of Aboyne against Innes, the elder Lord Meadowbank denounces the English notion that the right of game is in the crown, as ‘ a mere subtlety of the Norman lawyers’ which has no solid foundation.

“ In support of his plea, the pursuer refers to a passage in Stair (ii. 2, 68) where it is said, ‘ The hunting or killing of deer seems to be *inter regalia* with us, except those who have them within proper enclosures ; for otherwise, the king’s forest having no enclosures, the deer by straying abroad would easily be destroyed,’ &c. No authority is given by Lord Stair for the opinion here expressed ; and so far as the Lord Ordinary can discover, it has not been adopted or recognised either in the judgments of the courts or by our most approved institutional writers.”—Note by the Lord Ordinary.

The Lord Justice-Clerk remarked on the same passage : “ Indeed, were it not for a somewhat remarkable passage in Lord Stair, it may well be doubted whether the present claim would ever have been made.”

the king alone. It does not follow that they were drawn by himself, or that he ventured to issue them unbacked by the countenance of his advisers. It has been all along the constitutional practice in Britain to issue legislative proceedings in the name of the sovereign, and the Acts of Parliament of the present day are by title the doing of the sovereign by advice and consent. Of these old Acts we only possess copies in which preambles and other formal matters are not repeated. There are other regal acts of David and his successors, of which we have not merely casual copies but the actual record, and that because they were not merely general laws or precepts addressed to the country at large, but were documents imparting important rights to persons of consequence or to communities, and they were consequently preserved like title-deeds with all their formalities and appendages. In these, when they contain *matter of far less importance than the most inconsiderable of the assizes*, we invariably find some body of men concurring, whether as the councillors who have taken the responsibility of recommending or countenancing the step taken, or as persons whose assent was necessary to render the royal act effective.

The growth of the feudal Parliament in Scotland follows exactly, though lagging a considerable way behind, its growth in England. The king acts with "concilium" or council, a word which has led to deep misunderstandings, since it has been supposed to refer to a *council*, or established body of responsible advisers, whereas it really means the counsel or advice given him by those he consulted. It is one of the natural consequences of this confusion of meaning that an assembling together is a necessity of the one, but not of the other, since the advice of the several councillors may have been taken separately. The advisers are at first few in number, but they extend and become systematised into the Estates of Parliament. To their progress towards completeness as a legislative tribunal much assistance was given by the necessities of kings, and their applications for money beyond the amount of the feudal taxes and casualties which they were entitled to take without any vote of consent.

The critical position of the country at the point which

we have reached seems to have rapidly enlarged the attendance of the notables, or dignified clergy and great landholders. Those assembled in 1283 at Scone to acknowledge the Maiden of Norway as the heir to the throne, consisted of thirteen earls and twenty-four barons or knights. There were no churchmen present, nor did the Act in which the assembly embodied its resolution pass in the name of the king. The whole proceeding seems to have been of a purely feudal character—those who held the great fiefs of the crown declaring whom it was that they were to acknowledge as their superior.<sup>1</sup> The convention at Brigham in 1289 about the marriage of the Princess with the Prince of England, consisted, besides the four guardians, of ten bishops, twelve earls, twenty-three abbots, eleven priors, and forty-eight barons. In the address which they sent to King Edward, their names were enumerated as if with a view to impress him with the number and influence of those who desired to further the projected union.<sup>2</sup>

But besides the roll of magnates, lay and clerical, who gave their counsel to the sovereign, the records reveal another element of authority in the country—an element mentioned fugitively and briefly, yet so distinctly that it can be seen to be of a popular character. Hence it has been naturally an object of much criticism and speculation, not always coming to any distinct satisfactory conclusion. The facts in themselves are soon told. For instance, take a statute of King Alexander II., bearing date in 1230, for restricting the privilege of knights and barons to borrow or become bail for persons accused of crimes, beyond the circle of their own followers. It was passed in the presence of two churchmen and five laymen, who are named, and of “many others.” Then it is recorded that the king passed the measure with the advice and consent of those present, and of the whole community.<sup>3</sup>

Another Act, dated in 1244, professed to have been

<sup>1</sup> Act. Parl. i., Préf. 7; Act Al. III., p. 82.

<sup>2</sup> Acta Margaritæ, p. 85.

<sup>3</sup> “Statuit Dominus Rex Alexander, apud Striveling per consilium et assensum eorundum magnatum et totius communitatis suæ.”—St. Alex. II., iv.

passed with the consent of certain magnates, whose names are given, and of many other earls, barons, and other the king's worthy men of Scotland.<sup>1</sup> Still broader, and, it must be admitted, vaguer, is the tenor of certain charters to the first great religious houses established in Scotland on the Catholic revival, inaugurated by St Margaret. In the foundation of the Abbey of Dunfermline, of the Abbey of Holyrood, and perhaps in other instances, the king acts on his royal authority and power, with the consent and attestation of the bishops, earls, and barons of his realm, and the acquiescence of the clergy and people.<sup>2</sup>

No collateral light is found to aid us in reading these curious intimations. They stand by themselves, an acknowledged—sincere or not—of the admission of popular influence in the actions of the government. More than one attempt has been made to show that the popular element was no other than the representation of the municipal corporations in Parliament.<sup>3</sup>

In fact, however, the municipal corporations had a political position of their own, too distinct and important to let us suppose that it could be referred to in these vague acknowledgments. Apart apparently from the landed aristocracy and the Church, they were consolidating a power of their own, which enabled them to form a leading element in the more elaborately constructed parliaments of later times.

<sup>1</sup> "Et aliorum comitum, baronum et proborum hominum suorum Scocie."—St. Alex. II., xiv.

<sup>2</sup> If we must not take the charter of Malcolm III., about coeval with the Conquest, as genuine, we have the terms repeated in the later confirmations: "In nomine sancti Trinitatis, ego Alexander, Dei gratia Rex Scotiæ, auctoritate regia ac potestate, episcoporum, comitum, baronumque regni mei consensu atque testimonio, clero etiam adquiescente et populo."—Act Alex. II., Apx. 76\*. See also the Introduction to the Register of Dunfermline, edited for the Bannatyne Club. The "Clero etiam adquiescente et populo" will be found in the charter of erection of Holyrood by King David, before the year 1150. in Acta Regis Davidis, 46\*.

<sup>3</sup> In 'Observations concerning the Public Law and the Constitutional History of Scotland,' by Gilbert Stuart, this view is set forth with that resounding march of rolling sentences of which he was a special master.

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Before parting company with Roman dominion in Scotland, something had to be said about those eminent departments of the Empire—the Municipalities. Some of these, near the centre of Roman government, can trace back their municipal existence to the days of the Republic, and of many others it may be said that as early an origin is likely enough, though it cannot be shown. We have nothing to prove that in Scotland any of the institutions of the Romans outlived the confusions following on their departure. It is certain, however, that whenever the greater portion of the provinces north of the Tweed became consolidated into a state, municipalities on the Roman model grew rapidly within it. The form of this kind of organisation had been so perfected that it could be extended from place to place with entire ease, and it adapted itself at once to the organisation and government of any considerable body of men collected on one spot. We are not to suppose that those who propagated the system were deeply read in the books of the Roman law. Indeed, they might have searched these to the utmost without finding much to guide them; for it may be noticed that, loquacious as the civilians are in stating and solving abstract cases of legal difficulty, they are shy in dealing with the practical institutions of the Empire, and what we know of these, in fact, has only been extracted by slow degrees out of literature and history. It was from the still living practice of these institutions over the Roman world of the Continent that they passed into Britain, where there were social and political conditions that made them acceptable, and gave them a firm rooting.

While the internal machinery of these institutions was taken precisely from the Roman model, there were in their political relation to other members of the state notable differences of a very instructive kind. There were marked dissimilitudes between the standing of corporations in some parts of Europe and their standing in others; and some of the corporations, such as those of England and Scotland, though in their internal structure they were copies of the Roman municipalities, had not the same relation towards the ruling power. In some parts of Europe the municipalities were so powerful that, in the

reconstruction of the several powers during the middle ages, they worked themselves into separate states; such were Florence, Venice, Genoa, and Hamburg. Even in Russia the municipal authority was so powerful that it had a long contest with the royal or imperial authority; and it used to be a common saying in reference to the mighty power of the chief corporation there, "Who can resist the great God and Novgorod?" In Britain, all the corporations were subsidiary to the supreme power. In the corporation of London only do we find the relics of some bold efforts to achieve an independent legislative existence—an aim in which so potent a community might have succeeded in a country with a less sufficient central government than England.

Great and small, we can best understand the special character of the corporations by looking on them as mighty relics of the Roman Republic. Rome was itself a great republican corporation; and when it conquered far and wide, it naturally would not place its acquisitions under monarchs, but multiplied over them the forms of its own republican institutions. These were not congenial to the imperial government, but the municipal system was firmly rooted long before the Empire, and there was still a sufficient framework of republicanism in the imperial city itself to keep the corporate arrangements of the old Empire corporations during the subsistence of the Empire, so far different from those of later times, that they all held by, and were dependent on, the great corporation of Rome as a centre. By their later constitution, which still nominally exists, some of them became, as we have seen, separate states, while others were dependent on monarchs, or on great spiritual or temporal lords. The tendency of their spirit was, however, antagonistic to feudalism, and they proved generally to be separate plebeian or republican institutions having a separate interest against the aristocracy,—an interest which was apt to bring them into alliance with monarchies.

It was especially so in Scotland. The highest kind of corporation—the Royal Burgh—has always been the direct creature of the crown. It must, according to the theory of

such corporations. The crown asserted its prerogative either by extinguishing such a grant or sanctioning it, and probably adopted this latter alternative when the other would have been preferred had it been sure to succeed. Thus in one way or other, down to the time when government got into a settled shape and kept to precedent, the crown preserved the prerogative right of giving life to municipal corporations of all grades. Some of the regality and barony corporations became rich and powerful, and then were raised to the rank of royal burghs. Several of them held under ecclesiastical lordships, such as the great abbeys, and these had generally a far better lot than those which were under the banner of quarrelsome lay lords.

No higher class of municipal corporation than the royal burgh was known to the law. The *civitas*, or city of the Romans, which is understood to have expressed a central corporation governing others of inferior degree, was not an institution of Britain. Some towns were called cities by way of distinction, but this was done from accidental conditions which gave no special powers to their governors or representatives. Edinburgh became a city as the seat of royalty. When the great Italian municipalities revived after the fall of the seat of empire, the ecclesiastical part of the imperial system, which so effectively survived the political, took them in hand, and the bishops became their rulers. Owing, it is said, to this specialty, a certain municipal rank was permitted to accompany a bishop's see, and in England the cathedral town came to be called a City. The practice seems to be represented in St Andrews in Scotland, and in Glasgow, which was for centuries in burghal rank a mere burgh of barony.

Such terms as "municipality" and "corporation" are not to be traced back to ancient use in Scotland. It is not likely that any of the framers of the corporations knew that they were copying institutions invented by the Roman. They were spread over Europe, and found their way to this country, where they were eminently adapted to the spirit of the people. The name by which they were called bears witness to the purposes for which they were devised. The word "*broch*," both in England and Lowland Scot-

land, most one who helped himself to that, as I  
 eating it for him. So in the first of the "light"  
 and in the state of "light" and "dark" it is not a  
 community, why, united together in a state of mutual  
 care, and justice or justice for all. The  
 present of them is not a state, but a state of justice  
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 with them, they all the state of justice, and a state of justice  
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 and justice, and the individuality of the state is only  
 tested.

[illegible]

\* The Councils, of which the first edition is in the first volume of the South Acts.

trace of their existence, except in the elaborate code in which they were set forth, and probably they were a great project found not to work. The burghal corporations at all events ceased to be under control, and as independent communities scattered over the realm it was necessary that their powers should be limited, otherwise there could be no supreme government. Before, however, they felt the restraint of king and parliament, where they had their representatives to console them for loss of separate power, they had perhaps accomplished their mission by establishing several little centres of reaction against the predominance of feudal or aristocratic power.

As with the seignorial powers which were in vital force before the crown professed to create them, so it seems to have been with the municipal bodies, and their incorporation under the crown became thus a compromise, by which, on the one hand, their powers were kept within certain limits, and on the other they got the countenance and protection of the monarch. It is certain that mention is made even in royal documents of the existence of burghs long before the time when there is trace of any royal charter of erection having been granted. Perhaps the oldest known charter absolutely bringing a burgh into existence is that in which, about the year 1200, William the Lion created the burgh of Ayr, to be convenient to the castle which he had there built at the mouth of the river. But charters much earlier reveal that there were burghs in existence and recognised by name at the time when they were issued; for instance, some fifty years earlier, King David grants to his mother's Abbey of Dunfermline property in his burghs of Edinburgh, Perth, Stirling, Haddington, and Dunfermline.<sup>1</sup> In fact, the extent of the trading and municipal power that had grown in Scotland before the War of Independence is not easily realised, on account of the supremacy which feudalism obtained over it after the termination of the war. The crown is found with a liberal hand endowing municipalities with powers and privileges; yet it is easy to see that

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<sup>1</sup> Report, Commission of Inquiry as to Royal Burghs.

the liberality of the crown is measured by the power and influence already in possession of those whom it professes to favour. By one brief but very remarkable charter, King William the Lion gives the royal authority in a general way to municipal powers, which seem to have been too wide, alike in their character and their territorial extent, to be specifically defined by the officer who prepared the crown writs. This document professes to confirm privileges which existed in the reign of King David. They were possessed by the burgesses of Aberdeen and of Moray, and in fact by all the burgesses north of the Grampians; and the nature of the privilege was the holding of a free "ansus" where and when they pleased.<sup>1</sup> The ansus was a privilege of trade and association. What its exact technical meaning may have been it is difficult clearly to define; but of the extent to which these might reach we know by the example of the great Continental association of the Hanse Towns.<sup>2</sup>

About the time when the municipalities were first represented in parliament, dubious theories already referred to have been afloat: in these it seems to have always been taken as a point in favour of the antiquity of the popular element in the Scots Parliament that they held an early place in it. It may be questioned, however, whether, in their palmy days before the great war, a junction with the feudal parliament, such as it then was, must have been of necessity an object in the direction of their aggrandisement.

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<sup>1</sup> "Burgensibus meis de Aberdoen, et omnibus burgensibus de Moravia, et omnibus meis ex aquilonali parte de Munth manentibus, liberum ansum suum tenendum ubi voluerint et quando voluerint."—Leg. Dav. I. Vestigia, A. P. i. 77.

<sup>2</sup> HANSA Mercatorum Societas — Collegium HANSATUS, in hansam—id est societatem admissus, ex-German. *Hansen*, in numerum sociorum recipere. Du Cange Glos. We have, both in England and Scotland, the term *handsel* or *hansel* for the first money a trader received for goods—the realised beginning of transactions. It is used for the gratuities given after New-Year's Day, on "*Hansel Monday*," the equivalent in Scotland of "Boxing Day" in England. The Germans have apparently from the same source the verb *hanseln*, to initiate.

Looking forward, we find the earliest parliament in which the representatives of corporations held a secure place to be Bruce's great Parliament of 1326, when a supply was voted to meet the pecuniary cost of the War of Independence. In the mean time the burghs had become so much more matured for combined constitutional action than the other powers of the state, that they were organising themselves into a sort of separate parliament. How it fared with the Hanse associations north of the Grampians, and whether they ever showed head or strength, we now know not. It is pretty clear that no such associated institution survived the great war, although several eminent burghs arose out of its separate elements.

In the south, however, there was a burghal parliament. When we first make acquaintance with it, it is called the Court of the Four Burghs. These were Edinburgh, Berwick, Stirling, and Roxburgh, and it seemed to have retained its old name when other corporations joined it. Its functions were that mixture of the judicial and the legislative always found in the earlier legislative assemblies of modern Europe. It reviewed the decrees of the Lord Chamberlain in questions where individual corporations were concerned, as the English Parliament reviewed the decisions of the king's judges—the Chamberlain himself sitting with the burghess representatives, and probably guiding their proceedings after the practice still followed by some law lord in the House of Lords.

The Court of the Four Burghs did not restrict its legislative powers to municipal organisation—it established rules of law on matters of private rights and obligations—as, for instance, on the modes of succession to the property of burgesses.<sup>1</sup> On such matters they took earnest

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<sup>1</sup> It seems to have been held by the chief courts that the burghs might have special laws of their own for private rights and obligations, and that the Court of the Four Burghs was the interpreter of these laws. Thus Marjory Moygne, widow of a burghess of Berwick, sues her husband's executor for 200 merks settled upon her by her deceased husband before marriage. He died bankrupt, and she maintains that, by burghal custom, her claim became a privileged

counsel with their brother corporations of England, showing, in an eminent degree, that spirit which has made the great trading towns of Europe ever seek the establishment of uniform laws as an efficacious facilitator of trade, by enabling every trader to know how he is bound to act, and what form of bargain will hold good in the various places in which he trades. Altogether the laws of the Four Burghs are more complete and compact, and have in them more of the qualities of a body of statute law, than any other fragments of ancient legislation in Scotland.

The power which this body must have had of old is attested by its marvellous tenacity of life. By degrees it absorbed all the royal burghs of Scotland; but as it thus widened, its separate influence dwindled, not so much from this widening, as because the municipalities took their place in the general parliament of the land. Under the name of the "Convention of Royal Burghs" it continued to adjust questions about the internal constitution of the separate corporations. This function was superseded by the Burgh Reform Act of 1833; but the Convention still duly meets every year in Edinburgh, and has its formal parliamentary sittings, as if to keep the institution alive and ready for action should its old powers ever revisit it.<sup>1</sup>

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debt, which must be paid before the estate is distributed by dividend among the other creditors. The supreme judicatory for the time refer the question to the Court of the Four Burghs, who report the custom to be in favour of the widow: "*Requisiti fuerunt de consuetudine burgorum, si petitio dotis sit principale debitum, necne, et si debeat solvi præ aliis debitis. Qui dixerunt quod lex et consuetudo burgorum Scotiæ talis est, quod petitio dotis est principale debitum, et quod præ aliis debitis debet solvi.*" It is very unlikely that this litigation would have come down to us if it had not become memorable from one of the parties appealing against a judgment in Scotland to King Edward I. of England, when he was asserting his right of superiority over Scotland. The affair thus became a leading case of signal importance, and was preserved in Ryley's Collection of Pleadings in Parliament, p. 145. See also Stevenson, Documents connected with the History of Scotland, i. 378.

Whoever desires to follow up more fully the history and acts of the Convention will find the way prepared for him in the 'Records



period has held a great place in the esteem of men. Of Roxburgh, one of the four pre-eminent cities, there stands not one stone above another. Inverkeithing, where sometimes the burgher parliament and sometimes the king's court was held, is a dirty village, curious in its squalid memorials of old importance. Glasgow has long ceased to bewail the oppressions which as a mere burgh of barony it suffered from its haughty neighbour Rutherglen, a royal burgh, with exclusive privileges of trade over the surrounding district. Most memorable of all has been the fate of Berwick. From its wealth and magnificence this town was becoming the capital of Scotland, as London had become that of England.<sup>1</sup> Indeed, it stood in the estimation of contemporaries as a rival to London and some of the great Continental municipalities. The English Government repeatedly tried to set up a castle on the south side of the Tweed, to menace it and cripple its trade, but the project was ever defeated by the vigilance of the burghers, backed by the Government of Scotland; and the Bishop of Durham having once managed to get the castle erected, it was pulled down again.<sup>2</sup> The fate of this great trading mart was that which ever must befall a centre of civilised industry, when in the course of events it becomes the centre of an exterminating war. Berwick became the one trophy which England retained of the great contest with Scotland, just as Calais was for long the one monument of the subjugation of France. Berwick remained long on the statute-book a signal memorial of the precision with which the marches between England

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<sup>1</sup> "*Ipsa civitas quondam adeo populosa ac negotiosa exstiterat, quod merito altera Alexandria dici poterat, cujus divitiæ mare, et aquæ muri ejus.*"—Chron. de Lanercost, 185. The chronicler, who is a churchman, praises the liberality of the citizens in contributing to religious and charitable institutions; but, as will occur, there are exceptions. There was a foundation to honour the festival of St Francis, and the endowment of certain poor brethren, whom the corporation were beginning to starve; but they were checked by the apparition of its founder, John Gray, who was both a knight and a burgess. In the *Livre de Reis* (319) it is said that, when the English took the town, "there great possessions were found, and much property."

<sup>2</sup> Chron. de Lanercost, 7.

and Scotland had at last been drawn. The Acts of Parliament which were to be law for England could not be law there also, unless they specially included "the town of Berwick-upon-Tweed."

Such recollections give emphasis to what is perhaps, on the whole, the most interesting feature in the Scots municipalities—their close harmony with those of England. Although, as we have seen, the Government of Scotland would not permit a frontier fortress to be built on the English side of the Tweed over against Berwick, yet there was so little jealousy of general intercourse between the two countries, that we find notice of a bridge across the Tweed at Berwick so early as the year 1271.<sup>1</sup> The harmony between the municipal institutions of the two countries is witnessed even in their nomenclature, the English terms Mayor and Alderman being of common occurrence in Scotland until entirely superseded in after-times by the terms savouring of France—the Provost, the Bailie, and the Dean or Doyen. The thoroughly Anglo-Saxon character of these institutions must be visible in what has been already said of them. But there is more distinct testimony to the harmonious action of the municipalities of the two countries. We have seen that the Scots corporations took advice of those of England as to proper corporate custom and law. As there is little doubt that the impulse given to the corporation systems in both countries was excited by the determination to combine

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<sup>1</sup> In that year Adam de Bedford was beheaded in England for having associated with pirates (*prædones maris*) in Scotland, at the north end of the bridge of Berwick. The object of the procedure, whence this isolated fact is learnt, appears to have been to establish by inquest that he had property in England, so that he might be punished there for offences committed in Scotland (*Calendarium Genealogicum*, 56 Hen. III., p. 159). The *Scala* chronicle mentions, about ten years later, the destruction of the bridge from the swelling of the river. It is a coincidence that might have been thought ominous, that a chronicler, in the page in which he commemorates King Edward's assumption of the title of Lord Paramount and his right to dispose of the crown, records the fall of this bridge. "Enviroun cel hour chey le pount de Berewick outre lew de Twede de grant cretyne de eaw, pour ceo que lez archis estoient trop bassez."—*Scalacronica*, 118.



followed the fashions of the Romans; but it became especially the function of the Normans, as the active propagators of civilisation, to spread the method of building which they had seen in their conquests in Italy and France. The baronial form of it, at all events, was directly theirs. Wherever they went, they built castles, and as the style of building them changed with time until it worked itself into pointed Gothic, we know by the castles of a country at what time the Normans rooted themselves in it. In England it was the time of the great square towers, with round arches and no outworks; in Scotland, as well as in Wales and Ireland, it was the later time of the pointed arch, with central towers and circular flanking outworks.

Of this class we have fine specimens in Scotland—Bothwell, Caerlaverock, Kildrummy, Dirleton, and several others. The oldest of them is perhaps Hermitage, which has scarcely any flanking works—nothing but abutments at the corners, like the Norman towers, but in this instance they meet in a wide Gothic arch overhead. The erection of this castle was a political event importing that such buildings were rare. It has been told that in the year 1244 King Henry of England marched a great army northwards to attack Scotland, and among the grievances he had was the erection of this castle in Liddesdale so near the English frontier—it was denounced as a threat on the border, just as Scotland denounced the castle on the English side of Tweedmouth.<sup>1</sup>

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<sup>1</sup> "Quod quoddam castellum erectum fuit per Scotos in marchiis inter Scotiam in valle scilicet de Liddale quod appellatur Hermitage."—*Scotichron.*, ix. 61. Even though this story of the English taking umbrage be not correct, the passage shows how important this castle was considered. I believe it to be about the oldest baronial building in Scotland. It is strange that a building with such a memorable after-history—the abode of the wizard Soulis, the prison where Sir Alexander Ramsay was starved to death by the Knight of Liddesdale, the place to which Queen Mary made her frantic journey to see the wounded Bothwell—should have escaped the pencil of the illustrators of Scots architecture and scenery. There are, to be sure, representations of it, but I never saw one which gave a notion of its very peculiar architectural character.

There is something suggestive in finding that this, seemingly the

These fine Gothic buildings, probably the greater part of them built by the English invaders, are thus our oldest baronial remains. The rude square towers so abundantly scattered over Scotland, though invested by local tradition with indefinite antiquity, belong to the period after the war, and are generally no older than the fifteenth century.<sup>1</sup> What, then, are we to make of the numerous historical events in which castles figure back to the earliest times—castles still existing, as Edinburgh, Stirling, Dumbarton, and many others? Places of defence they were, no doubt, but it does not follow that they were castles such as arose

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earliest strength built in Scotland according to the new method, belonged to the most powerful of all the Norman settlers, the Comyns. It is very likely that there were then no such buildings in the royal fortresses. Had they existed in Edinburgh, Dumbarton, or Stirling, for instance, it is very unlikely that they would be utterly obliterated, for architecture of this kind survives an enormous deal of pommelling, hard usage, and even improvement. The White Tower of London betrays its Norman features vividly, for all the pains taken to obliterate them. On the rock of Edinburgh Castle there is one relic of old architecture, older still than Hermitage; it is a Norman church.

<sup>1</sup> When a building has any ostensible claim to antiquity as an obsolete type of castle or church, there is a popular notion that rudeness and decay are marks of age. No buildings last long but those that are firmly built, and our having in existence buildings of any assigned past age, depends on whether there was then a zeal and aptitude for thorough good mason-work. Hence very ancient buildings often seem more modern than others built centuries afterwards. Pæstum would seem fresh and new beside many of our buildings of the Restoration time of Doric architecture. It happened that the masons in Norman, and after them those in early pointed architecture, did their work thoroughly, laying it in courses of square close-cut blocks. Hence it will happen that the keep of a Norman castle seems to be more modern than the rude, decaying buildings of later time which cluster round it.

In the outlying districts of Scotland—those which were hardly under the crown till a later period—there are some rather puzzling castles, such as Castle Swein, opposite to Jura, and Dunstaffnage. These have little of the decoration that enables us to assign a building to its proper period of the Gothic series, and they have not the finish of the good specimens of the Norman and earlier pointed work; yet they are evidently early in the series, probably little if at all more recent than Hermitage. One might imagine them as built by the Norwegian potentates of the West in imitation of the models furnished by the English Normans.

this kind. Standing on their ridge, one can see how a fortress there commanded the passage of the mountain districts, both of the Grampians and the Ochils, through the great valley called Strathearn, still the main highway between north and south in Scotland. As to the dwellings within the ramparts of these fortresses, it is only to be supposed that they must have been built of the materials most readily at hand. That they were generally built of wood is inferred from the numerous burnings of these forts. Destruction of strongholds by fire is of continuous occurrence, from the dawn of history to the destruction of the Lord of Athole by the adherents of the Byssets in Haddington, and the burning out of the English garrison at Lanark by Wallace.

Whether or not this be a correct idea of the system of fortification in Scotland before the great war, it is at all events certain that, of castles of the Norman type, prevalent from the time of the Conquest to well on in the thirteenth century, Scotland can produce nothing to show that the country was under the influences which produced the grand specimens yet existing in England. The political significance of this is the more remarkable, as ecclesiastical buildings in that style in Scotland are abundant and magnificent. These are the mark, indeed, of the united inroad of Norman manners and Catholic unity according to the Roman model.

A word may be said about some relics of another religious school, the existence of which only tends to make more emphatic the impulse given at one and the same time to the architecture which came from Rome, and to the ecclesiastical system which radiated thence. Most people have heard of those mysterious edifices, the Irish round towers. We have two specimens of the same structure in Scotland; there are none in England or on the Continent. Buildings so exclusively peculiar could not but excite curiosity and wonder; and the more so that, while they stand beside churches, or are, indeed, actually part of them, yet it is clear that they were built at a different time, and never formed any feature of the design on which the church might be built. Many bril-

liant theories about temples of Phalic or Buddhist worship, and astronomical observatories for contemplative Druids, were dispersed by a minute comparative analysis of the features of the several round towers, and an examination of any scrap of history relating to them.<sup>1</sup> The results were clear, and adjusted themselves easily to historical conditions. Though different in their general form and structure from other early Christian buildings, yet many of the round towers had mason-work of the unmistakable Norman type; others were raised by builders who apparently were not acquainted with the structure of the arch, and who had neither this evidence of scientific advancement in architecture, nor any of the minor adaptations of the Norman school. A knowledge, then, of what was doing elsewhere, seems to have come in upon the native builders while they were at this kind of work, and so the later of the round towers are identified with the Norman period of architecture.

They were eccentric, however, in this, that while the Irish ecclesiastics seemed to have built nothing else of stone, or nothing of a lasting kind, they had raised these prodigious towers. Yet if we suppose their means to have been limited, this devotion of them would, keeping purely ecclesiastical purposes in view, be a good investment. The great difficulty they had to deal with was the sudden invasions of the Norsemen, who carried off what was ready to their hand, and burned what was destructible. One cannot suppose better fortresses of defence against enemies like these than the round towers. They had no stairs, and could only be scaled by ladders. Nowhere could the treasures of the Church—the books, the relics, and the objects of more material value—be so safe

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<sup>1</sup> A good example of how the same thing may be done in two totally different ways is found in comparing Mr Petrie's solid and cautious investigations with the more ambitious book of his rival, Henry C. ... *Towers of Ireland*; or, the *Mysteries of Freemasonry, of Sabaism, and of Buddhism for the first Time Unveiled.* This is about the wildest and grotesquest flight that archæological speculation has ever taken, and that is saying a good deal.

as high up in one of these stone tubes, whether attended by a guard or not. It was impossible to attack them without a scaffolding of equal height; for to attempt to topple them down by attacks from below, before the days of artillery, would have been destruction to the besiegers.

It was natural that, as the practice of their parent Irish Church, the raising of such buildings should find its way across to the ecclesiastics of Scotland, who came to be called Culdees. We have hence two modest specimens of them where there were eminent Culdee houses—Abernethy, on the south bank of the Tay, and Brechin. The tower of St Regulus in St Andrews, though square, belongs to the same architectural type.

These, then, as relics of the ways of the old Culdees, stand surrounded by the thoroughly Norman buildings of the age of Margaret and David. These are so conspicuous that every one having the least interest in such matters knows them. There are Dunfermline, Arbroath, Jedburgh, Kelso, and Coldingham—great studies for the historical architect. And now that such inquiries have come to be among the hobbies or pursuits of the traveller or tourist, small specimens, sometimes curious and beautiful, have been discovered in unexpected places, to bless the eyes that have first looked upon them with critical discernment.<sup>1</sup>

As we have seen in some other matters, so in this of the fashion of church architecture, the traveller crossing the border from England would not have felt that he had changed countries. The leading characteristics are the same in both countries. The Abbey Church of Dunfermline has features so identical with those of Durham Cathedral as to suggest that they must have been the work of the same builder. The oldest specimens of

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<sup>1</sup> About the fullest recent revelation of obscure specimens will be found in the two books of Mr Muir, 'Descriptive Notices of some of the Ancient Parochial and Collegiate Churches of Scotland,' 1848; and 'Characteristics of Old Church Architecture in the Mainland and Western Islands of Scotland,' 1861.



secret that there was white bread and brown or grey.<sup>1</sup> In the regulations for killing and curing meat it would be difficult to find any principle of philosophical legislation; but they reveal to us abundant food and lordly tables. The fleshers, or butchers, are to keep good flesh—beef, mutton, and pork—after the ordinance of the good men of the town, and to expose it openly in their windows, that it be seen of all men. They are to serve the burgesses in killing time—that is, from Martinmas to Christmas; and while so at work, are to board with the burgesses' servants. They are liable to penalties if they mismanage the meat.<sup>2</sup> A butcher was not permitted to be a pastrycook.<sup>3</sup> Among matters for inquiry and regulation by the Lord Chamberlain, was whether cooks prepared their food in a fit state for human use.<sup>4</sup> Such legislation is unknown at the present day, not by any means because the object has been attained, but because it is hopeless thus to attempt to effect it.

Scotland had the benefit of a complicated tariff, and we must count such an apparatus as a symptom of wealth and civilisation, even though a still higher civilisation denounces it. There is a good deal of trade in skins and peltry; and although this market might be in a great measure supplied from native produce, yet even under this head are names that speak of imported luxuries, as marten, beaver, and sable skins. There seems to have been an internal trade in fish caught chiefly off the northern coasts. We may infer that this commodity reached England, on finding that, in a purvey of provisions sumptuously ordered at the cost of King Edward of England for the entertainment of Queen Margaret and her court on their voyage from Norway, one item is a hun-

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<sup>1</sup> "Baxturis as bakis brede to sell sall bake quhyte brede and gray estir the consideracion and pryse of the gude men of the toune. . . . And quha that bakis brede to sell aw nocht for to hyde it, bot sett it in their wyndow or in the mercat that it may be opynly sauld."—*Leg. Burg.*, lx.

<sup>2</sup> *Ibid.*, lxiv.

<sup>3</sup> "Pastillarius."—*Fragmenta*, St. i. 365.

<sup>4</sup> *De Articulis Inquirendis*, St. i. 317.

dred fishes from Aberdeen. That they should have been supplied from Scotland to the place they were sent to seems the more strange that the beer for the occasion was bought in Norway.<sup>1</sup> There are duties on pepper, cumin, ginger, almonds, rice, figs, and raisins. The consumption of wine is a matter not so much of tariff as of internal regulation. Hostels or taverns turn up in the charters as a known established institution of the country. For some reason deemed sufficient, in a charter of William the Lion, it is forbidden that in the county of Perth there shall be a tavern in any town unless where there is a resident lord of the degree of knight, and even then one tavern must suffice.<sup>2</sup> A similar regulation applicable to the county of Aberdeen is found in the reign of Alexander II.<sup>3</sup>

What we can catch about the details of trade and agriculture is only in casual fragments. These are chiefly found in the chartularies of the religious houses; and although they were in close connection with places of trade, having under them some burghs with their harbours, and possessing property in others, yet naturally their title-deeds show more of the farming on their estates than the commerce of the towns. Whether or not their agriculture was of a scientific kind, it is certain that it was systematic and under regulation and supervision. It is possible to define the extent of the cottars' holdings, the produce and its nature, the rent or consideration given, and the arrangements for ploughing the fields.<sup>4</sup> Wheat was grown in the

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<sup>1</sup> Stevenson, Documents illustrative of the History of Scotland, i. 139. Under different circumstances we find King Edward's servants buying five hundred hard fishes of Aberdeen.—Ibid., 326.

<sup>2</sup> Vestigia, St. i. 76. The charter is in favour of the burgh of Perth, which is not included in the restraint, and it is supposed that the object was to give the burgh some monopoly in the tavern trade.

<sup>3</sup> Ibid., 77.

<sup>4</sup> "There is preserved a curious Rental of the great Abbacy of Kelso of the end of the thirteenth century, which gives us some insight into the rural affairs of the monks. At that time, and probably always, they held a great part of their ample lands and baronies in their own hands, and cultivated them by their villeins from their several Granges.

"The Grange itself, the chief house of each of the abbey baronies,

fertile plains of Morayshire ; and it is noticed that there are rules for the protection of growing corn and hay meadows.

It is noted as a type of civilisation, that in the chamber-

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must have been a spacious farm-steading In it were gathered the cattle, implements, and stores needed for the cultivation of their demesne lands or mains ; their corn and produce, the serfs or carls who cultivated it, and their women and families. A monk or lay brother of the abbey superintended the whole.

"Adjoining the Grange was a mill, with all its pertinents and appearance and reality of comfort, and a hamlet occupied by the cottars, sometimes from thirty to forty families in number. The situation of these was far above the class now known by that name. Under the monks of Kelso, each cottar occupied from one to nine acres of land, along with his cottage. The rents varied from one to six shillings yearly, with services not exceeding nine days' labour. The tenants of twenty-one cottages at Clarilaw, having each three acres of land, *minus* a rood, and pasture for two cows, paid each two bolls of meal yearly, and were bound to shear the whole corn of the abbey Grange at Newton.

"Beyond the hamlet or cottar town were scattered in small groups the farm-steadings of the *husbandi* or husbandmen, the next class of the rural population. Each of these held of the abbey a definite quantity of land, called a husbandland. Each tenant of a husbandland kept two oxen ; and six united their oxen to work the common plough. The Scotch plough of the thirteenth century was a ponderous machine, drawn, when the team was complete, by twelve oxen. The husbandland was estimated long ago in the Merse as twenty-six acres, 'where scythe and plough may gang.' The husbandmen were bound to keep good neighbourhood, the first point of which consisted in contributing sufficient oxen and service to the common plough.

"As a fair specimen of the rents at which these tenants sat, we may take the barony of Bowden, which, I believe, is now the property of the Duke of Roxburghe.

"The monks had twenty-eight husbandlands there, each of which paid 6s. 8d. of money rent ; but to this were added considerable services in harvest and sheep-shearing, in carrying peats and carting wool, and fetching the abbot's commodities from Berwick. These stipulations are exceedingly precise, fixing even the service, in which the husbandman was to have his food from the abbey, and where he was to maintain himself.

"In the whole catalogue, no service is imposed on women except harvest-work ; and I believe agriculturists will agree that we have a still more decided proof of advancing civilisation in the fact, that at the period of the rental the whole *services* were in the process of being commuted for money.

"Above the class of husbandmen was that of the yeoman, or bonnet-

which traversed them.<sup>1</sup> Bridges are mentioned, but not so as to give us any exhaustive list of them. There was a bridge over the Forth, spoken of in the laws as the junction-point between Scotland proper and Lothian. There was a bridge over the Tay at Perth, over the South Esk at Brechin, over the North Esk, over the Spey, and two, if not three, bridges over the Dee.<sup>2</sup>

These are doubtless narrow facts to draw a general conclusion from, and it is not easy to communicate that general impression which the investigator carries with him after rummaging unmethodically among old documents. It would be less satisfactory, however, were we to rely solely on the chroniclers writing after the war, who, seeing around them much poverty and misery, drew a glowing picture of the country's happiness and prosperity before the days of the disputed succession. These reminiscences have a mournful pathos, which goes much nearer to the heart than the ordinary laments for the departure of the

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<sup>1</sup> "Roads appear to have been frequent, and though some are called the green road, *viridis via*, and by other names indicating rather a track for cattle, others, bearing the style of 'high way,' *alta via*, 'the king's road,' *via regia*—*via regalis*—and still more, the causeway or *caulway*, must have been of more careful construction, and some of them fit for wheel-carriages. We find agricultural carriages of various names and descriptions, during the thirteenth century—*flaustrum*—*quadriga*—*chariot*—*corata*—*biga*—used not only for harvest and for carriage of peats from the moss, but for carrying the wool of the monastery to the seaport, and bringing in exchange salt, coals, and sea-borne commodities. The Abbey of Kelso had a road for waggons, to Berwick on the one hand, and across the moorland to its cell of Lesmahagow in Clydesdale. A right of way was frequently bargained for, and even purchased at a considerable price."—Scotland in the Middle Ages, 146.

<sup>2</sup> "If we reflect how few of these survived the middle of the fourteenth century, and how long it was, and by what painful efforts, before they could be replaced in later times, we may form some idea of the great progress in civilisation which Scotland had made during the reign of William and the peaceful times of the two Alexanders. We do not know much of the intellectual state of the population in that age, but regarding it only in a material point of view, it may safely be affirmed that Scotland, at the death of King Alexander III., was more civilised and more prosperous than at any period of her existence, down to the time when she ceased to be a separate kingdom in 1707."—Innes's Sketches, 157, 158.

good old days, since there is fact and reason for the lamentation. It is perhaps nowhere more touchingly rendered than in a piece of very simple verse, repeated by one of the old chroniclers, and deemed the earliest specimen of rhymed literature in the Scots tongue.<sup>1</sup>

A glance through the country's subsequent destinies will at least harmonise with the belief that it was opulent at the outbreak of the War of Independence. It was inhabited by the same race, who, since peace with the great neighbour began, has become what Scotland now is. If we look back to the year 1090, we shall find that there had been a long period of tranquillity, in which the country had been consolidating itself. The one considerable war-like affair—the battle of Largs—was merely local. Above all, there had been peace with England for upwards of a hundred years—ever, in fact, since the captivity of William the Lion. Such opportunities for progress and civilisation never came again to the country until the union with England, and after that the subsidence of the elements of strife had to be waited for before the country had a fair field for the development of its energies. From such considerations as these, it does not absolutely follow that Scotland, afterwards so poor, was an affluent country at the end of the thirteenth century; but the considerations are at least in harmony with the material facts tending to such a conclusion.

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1 "Gude Kingdome our lord was deid,  
That Scotland led in love and le,  
Awe was woe of ale and breid,  
Of wyne and war, of game and gide,  
Our reid was changed in a bide,  
Gude bome had, gude bome;  
Sunder Scotland and the de,  
This was the gude kingdome."

Andrew Wyntoun, who has preserved this for us, was not a political economist, and, thinking he must give reasons for the change, found them in the wise policy of Henry, Edward, and the English, a great number of which would be enough to show "that he was the gude kingdome," and hence it was so changed.

"A bome of this gude kingdome  
Of Scotland was the gude kingdome;  
A bome of love for ale and breid,  
It was the gude kingdome;  
For woe was a bome of gude kingdome."

—Wyntoun, l. 100.

## CHAPTER XVIII.

## THE DISPUTED SUCCESSION.

NARRATIVE RESUMED—DOUBTS ABOUT THE DEATH OF QUEEN MARGARET—A PRETENDER IN NORWAY BURNED AT THE STAKE—KING EDWARD AND HIS POSITION—COMMUNICATIONS OPENED WITH HIM—THE PREPARATIONS FOR THE ASSEMBLAGE AT NORHAM—THE ASSEMBLAGE AND ITS ELEMENTS—THE NOTARY PUBLIC—KING EDWARD'S ADDRESS—THE ASSERTION OF SUPERIORITY—THE ADJOURNMENT—NOTICE TO THE CLERGY, NOBILITY, AND COMMUNITY TO PUT IN ANY OBJECTIONS THEY HAVE—HOW THE NOBILITY AND CLERGY HAD NOTHING TO SAY, AND THE COMMUNITY WERE NOT LISTENED TO—THE ROLL OF COMPETITORS—EXCEPTIONAL CLAIM OF FLORENCE, COUNT OF HOLLAND—ALL COMERS HEARD—THE NARROWING OF THE LEET—THE COMPETITORS FINALLY LIMITED TO BRUCE, BALIOL, AND COMYN—THEIR GENEALOGIES AND CLAIMS AS DESCENDANTS OF THE EARL OF HUNTINGDON—THE MEETINGS AND DISCUSSIONS—THE METHOD OF PACKING A JURY FOR THE DECISION—ADJOURNMENT—DOINGS APART—EXAMINATION AND REMOVAL OF RECORDS—RETURN OF PRECEDENTS ORDERED.

LET us now return to the narrative at the point where we left it—the death of the young Queen of Scots on her way from Norway. The announcement of so portentous an event, through indistinct rumours, naturally caused men to talk and doubt. There was none of the solemn detail that might be expected to attend on a royal death, even though less heavily laden with a perplexing future. We are not told of any who were present—of the disease or its progress—of the spot where she died or the place where she was buried. The time of the death is only inferred to have been in September, because the first rumour of it is uttered in the famous letter of Bishop Fraser, presently to be noted, the date of that letter being the 7th of

October. To account for this mysterious silence in Scotland, it may be sufficient to remember that Orkney was then a distant province of a foreign country, and was unlikely to have direct communication with Edinburgh. On the other hand, the annals of Norway are at this period shadowy and imperfect. The project of the marriage has no place in them—they do not record her setting out on her voyage, or the names of her attendants, and they are equally silent as to her death. What the Scandinavian historians of later times can gather about the whole tragedy is from the abundant diplomatic records preserved in England; and when in these are seen the names of certain persons commissioned by King Eric to adjust the affair of the marriage, the Scandinavian historians have to content themselves with the supposition that some of these may have been the companions of her journey.

But ten years afterwards, Norway was strangely aroused to inquiry about the unremembered event. A woman came from Leipzig who proclaimed herself to be the daughter of King Eric and the lost Queen of Scotland. She said she had been followed to Orkney, and kidnapped and sold; and she gave circumstantiality to her tale by naming as the perpetrator a woman of high rank—Ingebjøerg, the wife of Thore Haakonsson. Like Simnel, Warbec, and other more recent claimants, she secured an audience and a following. King Haco, who had succeeded his brother Eric, took up her pretensions as a serious affair of state. She was tried as an impostor, and sentenced to death by burning. The sentence was executed at Bergen, and it is told that on her way to the stake she held to her story, and said she then remembered how, when a child, she had been at that very port with her father, King Eric, when she sailed for Scotland. The end seems to have excited popular belief in her story, and it comes down with traditions of a cruel martyrdom, commemorated in the dedication of an expiatory chapel. The whole affair has left on Scandinavian history a shadow of doubt, in the possibility that the child might have been spirited away by some one of those so deeply

interested in her disappearance ; and consequently, that it may be an open question whether the royal line of the Alexanders really came to an end until the consummation of this tragedy in the year 1301.<sup>1</sup>

It is in vain now to speculate on the future that would have been for Scotland had Edward II., King of England, and Margaret, Queen of Scotland, reigned together as man and wife, and left offspring. The position of King Edward was changed with everything else. The destinies of Scotland were no longer a matter for his paternal anxiety. In whatever he had done regarding Scotland, suspicious though the Scots might be, he had the legitimate purpose that he was guarding the interests of his niece. Even while there was no stronger tie, he was her nearest relation on this side of the North Sea, and bound to protect her interest from a formidable body who set covetous eyes on her inheritance. He acted the part of the kind parent, down to a care for the comforts of her voyage. Besides sending commissioners or ambassadors to represent him in the conduct of the preliminary arrangements, he freighted a vessel from Yarmouth with a cargo that must have afforded means of sumptuous living to the young queen and her followers. The same dry memorials—accounts rendered for moneys paid for the King of England—show that he had costly gifts of robes and jewellery set apart to grace the reception of his son's bride.<sup>2</sup>

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<sup>1</sup> *Det Norske Folks Historie fremstillet af P. A. Munch*, vol. iv. pt. ii. 192-198, 344-348 ; and see Torfæus, *Hist. Nor.*, iv. 464 ; *Annales Islandici*, 179. All that can be found about this strange story tends more to the excitement than the satisfaction of curiosity, and it presents an interesting point for archaeological inquiry from this side. In the accounts from the Scandinavian side there are entanglements in the shadowy references to another Scots alliance by Eric. In 1293 he married Isabella Bruce, a daughter of the competitor with Baliol. They had a daughter named Ingeborg.—Torfæi, *Hist. Norw.*, iv. 385 ; Munch, vol. iv. pt. ii. 280.

<sup>2</sup> *Stevenson's Documents*, i. 139-142, 186. It would seem, from expressions in these accounts, as if King Eric had been expected to accompany his daughter. It would also appear that the vessel containing the stores was to bring them over.



When these and suchlike matters of trifling concern were overshadowed by the gloomy end, what became evident as the predominant tendency of events was, that they had concurred with wonderful precision to throw the fate of Scotland into the hands of the King of England, and all men who knew anything about him knew that he was not a man to let slip his opportunities. At so strange and exciting a juncture in history, the chroniclers are naturally garrulous about such matters as the apprehensions of the people of Scotland and the temper and demeanour of King Edward. Such notices are unsatisfactory at all times; and where we have a deal of matter of the most instructive and emphatic kind preserved in the Norman records of the period, there is not even the ordinary temptation to repeat them. In fact, we know at this day much more about the things done, and even the motives of those concerned in them, than any of these chroniclers did, if we may except those who were admitted to a knowledge of certain secrets in order that they might do services by forgery or falsification—and there is not much to be relied on in the writings of this class. It is proposed, therefore, in the following statement of the events which placed a king on the throne of Scotland, to rely entirely on the testimony of authentic documents standing on record.

Before going into these events, however, it is proper to note in passing a domestic calamity befalling the chief actor; it is of moment, for it appears to have postponed the opening of the drama. Just about the time when the news of the death of the infant Queen of Scotland arrived, Edward was at the deathbed and the funeral of his wife, Queen Eleanor. He left to the world more than one noble memorial of his sorrow for her loss, and there is little doubt that they represented real grief. She was the partner of his perilous life in the Eastern wars, as well as of his pomp and power at home. It is seldom that from the records of royal unions we can carry away the impression of deep-rooted attachment, but it seems to have been so with King Edward and Queen Eleanor. There was a congeniality in the high spirit with which both were endowed;

and the qualities that made the great commander, the subtle politician, the unscrupulous usurper of national rights, the cruel tyrant in conflict with his fellow-men,—are not by any means inconsistent with domestic affections deep and tender.

To return to the revelations of the records. The first document of the series has given opportunity for much criticism, and invites more. It is a letter from William Fraser, Bishop of St Andrews, one of the *Guardians*, addressed to King Edward. It tells him of the rumour of the death of the young Queen Margaret—a rumour not yet confirmed, and which the writer fervently hopes to find ultimately contradicted. The rumour came, it seems, while the Estates were sitting to receive the answer of the king to the refusal to give up the fortresses to him. The bishop tells, as a significant occurrence, that Bruce had not intended to be present at that meeting, but did come, and with a large force, on hearing of the rumour. What his ultimate intentions might be the bishop professes not to know; but if it be that the queen is known to be really dead, he beseeches King Edward to approach the border, so that he may give comfort to the people of the country, obviate bloodshed, and help the faithful of the land to raise to the throne the man who has the proper title. It is shown that this must be Baliol; and there are some doubtful expressions, which some have interpreted to mean that even he should only be promoted if he shall conform to Edward's policy.<sup>1</sup>

It is very likely that the writer of this letter wished to make favour with the great king; but it is rather stretching interpretations to say that it imported the bishop's betrayal of his country, in an invitation to Edward to come and conquer it. The English king, as we have seen, had stood high in the confidence of those who represented public feeling in Scotland as a powerful and magnanimous neighbour, and the death of the young queen was, on the face of affairs at least, a calamity to him as well as to Scotland. It appears, however, that the bishop stood alone,

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<sup>1</sup> *Litt. et Autogr. Edw. I.*, in *Tur. Lond.*; *Fœdera*, i. 741.

or nearly so, in at that juncture welcoming the intervention of Edward. Perhaps the confidence the others had in his disinterested kindness as a neighbour had been shaken by the mission of Anthony Beck and the demand of the fortresses. At all events, on the records we find nothing farther in the shape of an invitation from Scotland to settle the affairs of the succession. If an invitation so meagrely sanctioned as this was worthy of being placed on solemn record, we may believe that any of a wider character would have been carefully preserved. None exist, and none are referred to in the abundant documents which do exist; and this is the more noticeable, as the chronicles tell how the community of Scotland invited King Edward to be arbiter among the competitors for the crown, and he, treacherously taking advantage of the opportunity thus afforded to him, laid his plots for the annexation of Scotland. He was prepared to take his own steps without any invitations or persuasions, and, seeing his way before him, went to work with great deliberation.

The next document is dated on the 16th April 1291, and is a summons to the barons of the northern counties of England to attend their king at Norham six weeks after Easter, or on the 3d of June. Among the English barons thus summoned stand the names not only of Baliol and Bruce, between whom lay the real contest for the crown of Scotland, but also of the subsidiary claimants, Comyn and De Ros. Were there any extant document calling on representatives from Scotland to be present, it would be interesting to note its terms, but there is none. In a writ, however, afterwards asking the Scots who were present to attend a meeting on the south of the Tweed, it is mentioned casually and courteously that they had attended at King Edward's request.

The meeting was held at the appointed time. King Edward with his advisers, and a body of nobles and prelates, were there; so were the greater part of the candidates for the crown of Scotland, with their supporters. There may also have been present some who rather represented the Estates of Scotland than any competitor, in a miscellaneous assemblage of persons, lay and clerical,

from England and Scotland.<sup>1</sup> There was present a personage of a very lofty position, understood to separate him from all the great interests at stake, in order that he, might, standing apart, be able to perform an important function, which connected the imperial system of administration with the feudal. This was Johannes Erturi de Cadomo, Notary Public of the Holy Roman Empire, who minuted the events as they occurred, and whose record of them, written with his own hand and properly certified, was not to be questioned by baron, prelate, or monarch. Lest there should be any suspicion of slovenliness or inaccuracy getting into the narrative, he takes care, from time to time to repeat that what is said is attested by him, Notary Public.<sup>2</sup>

And so this assembly proceeded to transact its momentous business. King Edward brought with him an address, which was delivered in Norman French by his chief justice Roger Brabazon. It set forth that the king had been touched by the condition of Scotland, deprived of her natural rulers by a succession of calamities, and involved in great perplexities, and that he was influenced by affectionate zeal for one and all of the community, who looked to him for peace and protection. So he had asked the meeting to assemble, and had himself come to meet them from distant regions, feeling that, as Superior or Overlord of the kingdom, it lay with him, in virtue of

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<sup>1</sup> "Multisque etiam popularibus tam clericis quam laicis regnorum Angliæ et Scotiæ."

<sup>2</sup> Sir Francis Palgrave says: "The roll exhibits extraordinary care in the manner in which it is made up, being written throughout in a very bold and legible character, by the own proper hand of John of Caen or de Cadomo, sometimes calling himself, according to the style of the Papal Chancery, *Johannes Erturi* [i.e., *filius Erturi vel Arthuri*] *de Cadomo*, who subscribes his 'sign' or *paraphe*, and which 'sign' is also affixed athwart the junctions of each of the membranes of which the roll is composed. This last authentication is added for the same reason that a testator now adds his signature at the foot of each sheet of a will. And the whole document was drawn up under the inspection of Master Henry de Newerk and of Sir Roger Brabazon, thereunto specially assigned by the king."—Documents and Records, Introd., liv, lv.

such his superiority and lordship, to do justice to all, and, putting an end to discord and dissension, to restore peace and tranquillity to a distracted country. There is next an assurance that he shall take nothing unjustly from any one, nor refuse, delay, or impede justice to any one; but as Superior or Overlord of the kingdom do ample justice to each and all. Then follows the concluding clause, which was no doubt the object of anxious and thoughtful adjustment. It was evidently framed on the policy, that it would not be safe to act instantly on the claim of superiority as a right known and admitted on all hands. It therefore, in a form of peculiar courtesy, desires that, for the facilitation of business, and that he may have the benefit of their assistance in transacting it, those present shall do him the favour to acknowledge his right as Superior or Overlord.

It is then explained that the reader of this document in Norman French took pains to render its purport intelligible to all; whereupon, as the record further bears, the Scots portion of the audience requested time to consult their fellow-prelates and nobles, and the community of the kingdom, before they made answer to this demand. Three weeks were allowed; at the end of that period all were to reassemble at Norham. A distinct answer was to be given on the question of the Superiority, and all who opposed or questioned it were to produce the documents or other evidence on which they founded their opposition or dubiety.

This meeting was to be on Scots ground, whether to assure the Scots who joined it that they were not under coercion, or for some other reason; and the record, with its usual precision, tells that it was held in the open air in a meadow by the Tweed, opposite to the Castle of Norham, the place of the previous meeting.<sup>1</sup>

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<sup>1</sup> "Prope flumen de Tueda, ex opposito castri de Norham, in area viridi sub divo." Looking at the massive ruins of Norham, one might imagine it selected as the centre of these transactions, showing to the assembled Scots a visible symbol of the terrible power arrayed against them. It was then freshly built, and endowed with those new elements of resistance and destruction introduced by the Norman kings,

ual revelation that this "community," however constituted, had spoken, and that what it said was suppressed, becomes an important feature in the history of Edward's claims. The Great Roll of Scotland, as published in all the editions of the *Fœdera*, says nothing about the plea of "the community." This shows that, if the notary who attested all the proceedings kept a note of this, it was excluded from the roll deposited among the records of the crown in England; and that, as no one can question, with design.<sup>1</sup> At all events, we now know the fact that some answer was made on the part of Scotland to King Edward's assertion of feudal superiority. That this fact has but recently come to light is only too characteristic of all our means of knowing the truth in the great question it bears on. Transactions are profusely recorded, as if for the purpose of courting all inquiry into doubts or difficulties that might affect conclusions, yet one ever feels throughout all this candour that the truth is to be found somewhere behind, and that the abundance of punctilious record is devised to conceal it.<sup>2</sup>

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*Scotiæ unanimi et expressa voluntate sua, suum præbuerant jam consensum.*—*Literæ Regis Angliæ, Erico Norwagiæ Regi de Papali dispensatione obtenta et de adventu Margaretæ filiæ suæ, Fœd. ii. 731.* The "communitas" of the Latin used in Scotland is converted into "commune" in the Norman French of the English scribes.

<sup>1</sup> Sir Francis Palgrave has preserved a curious little personal matter in which the king and the notary are concerned. The notary prefers a petition to the effect, "That he has by him many notes and remembrances of important matters concerning Scotland, which cannot be completed by any one but by himself. But during the last six years he has been so hindered and *riotted* at law by the Archbishop of Canterbury, that he has not been able to attend to the same, and he prays that the king may give order thereupon. The concluding portion of this petition rather tends to the supposition that Master John thought he had a better chance of succeeding in defeating the archbishop by the king's intervention, than by the justice of his own cause."—*Documents and Records, Introd., lvi, lvii.*

May it not also tend to the supposition that Master John had it in his power to do service in his way of recording the transactions, and that it would be good policy to treat him well?

<sup>2</sup> For this important contribution to history we are indebted to the version of the Great Roll in the chronicles of St Albans, elsewhere noticed more at length. The restored passage speaks for its own

All preliminary questions being thus cleared off, King Edward announced that he found his title undisputed, and intended immediately to proceed to business. Robert Bruce was then called on to state before the assembly whether he intended to prosecute his claim to the crown of Scotland in the court of King Edward, the lord superior. The record makes him state, with all the redundancy peculiar to the whole proceeding, that there, in presence of the prelates, nobles, and community, he finally and expressly acknowledges Edward, King of England, as Lord Superior of Scotland, and publicly agrees to plead his cause before such his superior, and abide by his decision.<sup>1</sup>

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authenticity by filling an obvious blank. In the Great Roll as it stands in the *Fœdera*, a reference is made to the Prelates, the Nobles, and the Community; but at the point where the result of the reference has to be recorded, it is only set forth that the Prelates and Nobles made no answer; nothing is said of the Community. As the passage stands in the *Fœdera*, it is—

“Et nihil omnino contra præmissa per episcopos, prælatos, comites, barones, magnates, et nobiles præfati regni Scotiæ proposito exhibito vel ostenso. . . . Propter quod vobis episcopis prælati,” &c. To these he intimates that, nothing having been brought up to impugn his right of superiority, he intends forthwith to do his duty as lord superior. The suppressed passage, which lies between the words *ostenso* and *propter*, is as follows:—

“Licet in dicto termino assignato nomine communitatis sæpediti regni Scotiæ, aliqualis fuisset in scriptis data responsio; nihil tamen efficax fuit per communitatem eandem propositum, exhibitum, seu ostensum, quoad rationes et documenta memorati domini nostri regis quod ad jus superioritatis, seu directi domini, executionis, seu exercitii, dicti juris, quod in præjudicio regno Scotiæ sibi competit infirmit aliquatenus vel enervet.”—Rishanger, 244.

It is elsewhere mentioned that this representation on the part of the Community which contained *nihil efficax* was put in French—a practice unusual in Scotland, though, as we have seen, it had been previously adopted in courtesy to King Edward. It is very significant that, on later occasions, when the silence of the parties interested is referred to as vindicating Edward's assumption, it is not stated that the Community were consulted—only the Prelates and Lords. This kept out of view a party to his transactions with whom King Edward was not inclined to deal, and removed the inconsistency in the Great Roll, where the question is put to three parties, and the result recorded as if it had been put to two only.

<sup>1</sup> It may serve as an instance showing how little one can trust the

Florence, Count of Holland, follows, and after him Sir John de Hastings, both repeating the same form, which was doubtless accepted by the others, although the notary seems to have contented himself with transcribing it three times over.<sup>1</sup> Then follow Patric de Dunbar Earl of

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chroniclers in matters long before their own day, to find the equivalent for this transaction in the chronicle of Andrew Wyntoun, written about a hundred years after the event :—

“To Robert the Brows said he:  
 ‘Gyve thou will hald in chef of me  
 For evyr mare, and thi ofspryng,  
 I sall do swa—thou sall be kyng.’  
 ‘Schyre,’ sayd he, ‘sa God me save  
 The kynryk yharne I noucht til have,  
 But gyf it fal of rycht to me,  
 And gyve God will thet it swa be,  
 I sal als frely in all thyng  
 Hald it as afferis a kyng.  
 Or as my Eldrys be for me  
 Held it in freast Reawtè.’  
 Wyth this Robert past his way.”

—Wyntoun, ii. 19.

In the *Scotichronicon* (xi. 10) it stands thus: “Cui simpliciter respondit Robertus et dixit, Si prædictum regnum per viam juris et fidèlem assisam adipisci valeam, bene quidem; sin autem, nunquam in servitutem redigam acquirendo mihi regnum præfatum, quod omnes reges ejusdem, cum magno tædio et labore, sine servitute, sub firma libertate hocusque servaverunt et tenuerunt;” and so in the other chronicles and the histories founded on them.

Such absolute inversion of fact is frequent at the period, and comes of a very obvious source. The name of Bruce became eminently popular in Scotland, and it became something more than a fashion to say and to think everything good of it. There are, in fact, two great elements of disturbance of the truth in the history of this period: the one arises out of the national quarrel, in which English and Scots writers each took the part of his country; the other comes of the division at home between the two parties—Bruce’s and Baliol’s. Bruce’s party have the last word in the dispute, and far the stronger part in it, since their hero and his country were victorious together before the Scots chroniclers began their work.

<sup>1</sup> The form was probably carefully prepared by a person learned in Norman feudalism, which was then more than three hundred years old, and had reached its prime. It is as follows :—

“Ad quæ dictus dominus Robertus de Brus finaliter et expresse, coram Episcopis, Prælatibus, Comitibus, Baronibus, Magnatibus, et Communitate, prædictis, et nullo contradicente vel reclamante, respondit, quod dictum dominum Edwardum, Regem Angliæ, in superiorem, seu directum, dominum regni Scotiæ publice recognoscit; et aperte concedit stare juri coram eo super jure successionis, quod



March, William de Ros, William de Vesci, Robert de Pinkeny, and Nicholas de Soulis. We are next told that John de Baliol, coming afterwards, put in his claim, which was admitted on the usual condition, and he is followed by John Comyn, Lord of Badenoch, who also is spoken of as a late arrival. These two appear not to have been present at the previous proceedings.

Here, then, were ten competitors for the succession to the crown of Scotland, who all accepted Edward as the Lord Superior of Scotland without hesitation. They had no doubt been dealt with beforehand, and knew exactly what they had to do. Much eloquence has been wasted on these men as the base betrayers of the independence and liberties of their country; but if we look at the surrounding conditions, nothing can be more natural than their conduct. To Scotland they were aliens, and they belonged to a class of aliens peculiarly offensive to the people, of whose evil wishes regarding them they were well aware. That some of them held great estates in Scotland is true, but it cannot be doubted that they would gladly have exchanged their holdings for equivalents elsewhere. In dramatic history, the policy of some of them can, by a little colouring, be rendered unchivalrous, if not base. They appeal to Scotland as ambitious of reigning over an independent kingdom—they offer that independence to King Edward as a consideration for the employment of his influence in their favour. No doubt they dared not, in Scotland, hint anything about vassalage to England. Whatever may have been privately known or hinted among those who could be trusted, such a condition could never take practical shape in dealings with the Scots Estates. To have any chance with them, the Norman courtier must make himself, as nearly as he could, a patriotic Scotsman. To Bruce, Baliol, and Comyn—the three who had a strong Scots connection, and large estates

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sibi ad præfatum regnum Scotiæ competit quoquo modo; et etiam, ad petendum, respondendum, et recipiendum, ab eo, et coram eo, sicut a superiore et directo domino regni Scotiæ, ut præmittitur, complementum justitiæ in hac parte.”—Rishanger, 246.

of the common and civil law, the more fully did the whole process impress on all men's minds the reality of the Lord Superior's title and power. The jealous formalists of feudal procedure were careful at every step to announce the style, title, and prerogatives of the Lord Superior. When a new claimant appeared, the first thing he had to do was to record his acknowledgment of this great condition; and at every step onwards in the resumption of his pleadings he professed that he spoke to the Lord Superior of the realm of Scotland, and humbly entreated the king in that capacity to do him right. If the long-cherished object of the Norman kings of England was to be accomplished by fastidious adherence to feudal forms, and a patient hearing of the pleadings of all claimants, the Great Roll of Scotland should certainly have brought the question to an end.

It was not among those who were nearest in blood to Alexander III. that the contest ultimately lay. Their descent from the royal house was in all instances tainted with illegitimacy; and that they should have pushed their claims only shows that the Church had not yet absolutely established the rule that from her alone, and her ceremony and sacrament, could come the union capable of transmitting a right of succession to offspring.<sup>1</sup> The ecclesiastical power, however, had advanced since the days of Norman William. The Church was strong enough to refuse all ecclesiastical sanction or ceremonial to the crowning of a king the union of whose parents was not sanctified by the Church. The nearest of these claimants was Nicholas de Soulis, descended of the marriage of Marjory, an illegitimate daughter of Alexander II., to Alan the Durward. It has been already noted that Alan drew on himself, even in Alexander III.'s lifetime, a suspicion that by getting his wife legitimated at Rome he might make his family the next in succession to the throne. His descendant pleaded some sort of legitimation, but scarcely obtained a hearing for it. Among others of the same class were the Earl of March, William de Ros, William de Vesci, already men-

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<sup>1</sup> See above, i. 419.

Margaret, the eldest daughter of Earl David, became the wife of Allan of Galloway, the representative of that line of half-independent chiefs which had been so sore an interruption to the aggrandising process of the Scots crown. Their daughter, Devergoil, was married to John de Baliol, Lord of Nyvell in Normandy, and of Harcourt and Castle Barnard in England. The great wealth of this house gave solidity to the elements of princely rank inherited by the Scots heiress. The lords of Galloway had been champions and benefactors of the Church within their own province, where they founded four monastic houses—Whithorn, Dundrennan, Glenluce, and Tongland. The enlightened munificence of their descendant the Lady of Baliol is testified in Baliol College of Oxford, founded by her when

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what countryman he was. It fortuned that this Oliver had one of the gates in keeping, on that side the towne where was but a single wall, without trenches, or anie other fortification. He happened by some good adventure to espie amongst the watch of those that were of the retinue of David, Earl of Huntingdon, one of his own kinsmen named John Durward, with whom of long time before he had beene most familiarlie acquainted; and incontinentlie he called to the same Durward, desiring under assurance to talke with him. After certeine communication, for that this Oliver had not as yet utterlie in his heart renounced the Christian faith, he appointed with Durward to give entrie at a certeine houre unto Earl David, and to all the Christian armie, upon condition that Earl David would see him restored againe unto his land and heritage in Scotland. The houre set Earl David came with a great power of men to the gate before rehersed, where he was suffered to enter according to appointment, and incontinentlie with great noise and clamour brake into the midst of the citie."—Holingshed, i. 384.

The chronicle goes on to say how, in the tempest which imperilled the return of Richard and his followers in the Mediterranean, Earl David was cast ashore on the coast of Egypt and sold as a slave. There he was bought by certain Venetians, who took him home to their own city, where he was ransomed by English merchants. Before reaching home he was again storm-tossed, and, running for the Firth of Tay, he put in at a place called Alectum, which, in his thankfulness, he changed to Dei Donum, or the gift of God, whence it has ever since been called Dundee. It is to his thankfulness, and the fulfilment of a vow taken in his peril, that the chroniclers attribute his founding the Abbey of Lindores, on the south shore of the Firth of Tay. The scattered ruins show that its buildings were once magnificent.

she was a widow.<sup>1</sup> It was her son, and the great-grandson of Earl David, who was now a claimant for the crown.

Devergoil had a sister, Marjory, married to John Comyn, Lord of Badenoch. He also had princely possessions; and his race, of which there were many branches, formed altogether the most powerful baronial family in Scotland. He boasted too, but in a shape that has not distinctly come down to us, of descent from Donald Bain, a son of "the gracious Duncan," who for a brief space occupied the throne. Comyn was nominally a claimant for the crown. Had there been a scuffle for the succession, his chances of success might have been strong. But in the decorous and precise court of the Lord Superior he could plead nothing to the point but his descent from a granddaughter of Earl David, and this brought him immediately behind Baliol as the descendant of her elder sister. His claim, then, may be considered among the others taken out of the arena of the contest, and we must go back to Earl David to see where Baliol was to find his real competitor.

Earl David's second daughter, Isobel, as we have seen, was married to Robert de Brus, or Bruce, a cadet of Norman family, powerful among the baronial houses of the north of England, where we have met with them fighting against Scotland in the wars about Northumberland. This Robert, in addition to great estates in England, was Lord of Annandale in Scotland, which had been in the family for upwards of a century and a half, as the gift of King David. The competitor for the crown was a son of this marriage, a man advanced in years, and with a son in middle life, who had enhanced the fortunes and power of the house by marriage with the heiress of Carrick. He pleaded a special title on a transaction some fifty years old, which

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<sup>1</sup> The charter of foundation by "Dervorguilla de Galwedie Domina de Balliolo" is No. IV. of "Facsimiles of National Manuscripts of Scotland," selected under direction of the Lord Clerk Register, Part II. "At the time of our charter she had been twelve years a widow, and was carrying on the education of her two sons at her new college—among them perhaps the unfortunate John, who already looked to the throne of Scotland, which afterwards, in right of his mother, he successfully claimed."—(Editor's Introduction.)

gave him a sort of parliamentary title—King Alexander II., when childless, having, as he asserted, named him heir to the throne before the assembled magnates and community, who accepted him as the person who was to reign over them if Alexander died childless.<sup>1</sup> The conditions had materially changed, however, since that transaction. He was then the only male descendant of Earl David; now there were several male descendants. The question then swept clear of this old business, and settled on the hereditary claims of the several candidates.<sup>2</sup>

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<sup>1</sup> See above, p. 13.

<sup>2</sup> Though there is no better authority for this transaction than the statement of a competitor for the crown, who was not very scrupulous in what he said or did, yet it is natural to the circumstances. Between collaterals equally near in blood—the one female by an elder daughter, the other male, though by a younger—it was conformable with all the practice of European states that the male should have preference. When the question came up, after intermediate events which bade fair to supersede any practical occasion for solving it, the rise of a new generation made it a question between male representatives; and in almost every country in Europe at that time this would have made a serious difference in the elements for decision on the succession, whether that decision was to be made by a feudal lord, or, as it then was in Scotland, by the principal persons and community of the country.

This incidental plea of Bruce's is duly entered in the Great Roll as already cited. It comes out more fully in the papers about the competition for the crown, edited by Sir Francis Palgrave, in his volume of Documents illustrating the History of Scotland. In these documents the affair is twice stated; once when Bruce threatens that, if any step be taken by the guardians inimical to his rights, he intends to throw himself on the protection of the King of England; and again, when King Edward, as Lord Superior, heard him plead his case as a claimant of the crown. Bruce's statement is of a natural occurrence; he maintains that it was acknowledged by Alexander III., and appeals about it to the testimony of persons still living. Any record of it might have disappeared in the general loss caused by the confusions of the wars, without supposing that King Edward thought it worth his while to destroy it. Then, when Alexander II. had a son, and that son reigned and had a family likely to continue the succession, the adjustment of the succession among collaterals ceasing to be of moment might naturally enough be permitted to go with the other unimportant matters which dropped out of the National Records.

It is not easy in modern English to convey a notion of the technical formality of these Norman feudal proceedings. The nearest thing to

Bruce's position was, that he was descended from the younger daughter; but was nearer by a generation than his competitor Baliol, the descendant of the elder daughter. Here, then, lay the great question that was put at issue in

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the impression of an actual perusal of them is to be found in the rendering of their meaning by Sir Francis Palgrave, who was a thoroughly congenial spirit, and their true interpreter to the present day. What follows is given as a specimen, being applicable to this stage of the proceedings. Bruce brings up the recognition by Alexander II., and Baliol meets it. Had Sir Francis been a great historical artist, he could not have put the hard formalities of the Lord Superior's court in better antithesis with the momentous interests at issue, and the memorable struggle in preparation, than in speaking of the king, who desired to make a settlement, having died seised of the kingdom in his demesne of fee and right, and that from him the right descended to one Alexander, his son and heir.

'Bruce states, that when Alexander II. proceeded in war against the Islands, he granted and ordained, as he who was best informed concerning his own blood or family, and by assent of the bishops and earls, and of his baronage, that, in the event of his dying without an heir of his body, Sir Robert Bruce, as the nearest of his blood, should be held his heir in the kingdom of Scotland: and a writing was made accordingly, and sealed with the seals of the king, the bishops, and the other great lords, and deposited in the treasury. And of this he prays that inquiry may be made by the baronage of the land, for of those who know the fact many are now living.

"The traverse or replication made by Balliol, as entered upon the roll of Norham, and also upon the notarial protocol, seems to show that the petition of Bruce there presented contained some further averments: for, in reciting this instrument, Balliol, after noticing that Bruce had alleged that Alexander II. made the recognition before his barons, proceeds to add, that Bruce also stated that Alexander III. made the same recognition, with the knowledge of Devergoil, the mother of John Balliol, who did not contradict the same. Balliol then proceeds to argue—cautiously adopting the forms of pleading and technical language of the English common law—that such recognition cannot avail, inasmuch as Bruce acknowledges that Alexander II. died seised of the kingdom in his demesne of fee and right, and that from him the right descended to one Alexander as his son and heir, who in like manner died seised thereof; and therefore, by his own acknowledgment, he shows that Alexander II. did not die without heirs of his body. And the right of his kingdom was transmitted by his death to his heir, and thus by the recognition of Alexander II. (if it was made) no right could be acquired. The original replication of Balliol to the first petition of Bruce is extant; it is much damaged, but we can collect that in its general import the argument was pursued in the same manner as in the replication recorded on the

the court of the Lord Superior. It is necessary, before going into it, to say that John de Hastings, Lord of Abergavenny, appeared as the descendant of Ada, the third daughter of Earl David. His claim from the beginning lay behind both Baliol's and Bruce's, but we shall find that the pleadings in it afford some instructive matter.

These, which may be called preliminary proceedings, occupied thirteen meetings in the year 1291—the first in May, the last in August. The record notes precisely each day, with the business transacted and the place where the meeting was held. The definition of the place of meeting in each instance is given with the precision acquired by lawyers, who do not profess merely to satisfy those who want to know the fact, but are prepared to baffle the enemy entitled to take advantage of every quibble which he can found on ambiguity or indistinctness. When business goes on in the Castle of Norham, it is within the king's chamber there. When there is an adjournment to the other side of the river, and to Scots ground, the place of meeting is not only described as a meadow on the margin of the Tweed, opposite to Norham, but the parish and the diocese are given. Of meetings held in Berwick, one is in the castle, and others are in the church of the Dominican Friars there, described as deserted.

Important business was transacted at the meeting held on the 3d of August. King Edward intimated his desire that the two competitors, Baliol and Bruce, should each choose forty men, while he should choose twenty-four, or a larger number if he thought fit. There is an indefiniteness, very unlike the rest of the record, in the functions of the persons to be so chosen: they are spoken of as if they were to be mixed up into a common body of referees to consider the whole matter at issue.<sup>1</sup> The arrangement

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Norham roll."—Palgrave's Documents and Records, *Intro.*, p. xxiii. xxv.

<sup>1</sup> "Qui omnes assignati et nominati, congregati in unum, in loco et termino per prædictum dominum regem statuendis, de jure cujuslibet prædictorum nobilium, jus in successione prædicti regni Scotiæ ven-

the younger child, or the more remote descendant by the elder, had the preferable title.

At this meeting the whole body of candidates, who as yet had only generally announced their claims, rendered them in technical form. In the court of the Lord Superior nothing could be admitted as understood fact, even in so large a public question as the succession to the crown of Scotland, and each must give the genealogical foundation of his claim. The cases so put in are exquisite pieces of draftsmanship, and might be models for the peerage practitioner or any other genealogical lawyer of the present day. That ancestor in actual possession of the crown to whom the claimant pleads the right of succession is brought distinctly out. His several lines of descendants, both those which have given successors to the crown and those which have not, are discussed successively; and as each is thrown out, the claim goes back again to the common ancestor until all are exhausted—some by the line coming to an end, some by disqualification, until the claimant comes out as the true representative. So, each having in terms of a formula put in his claim, the pleadings and arguments on which each founded in support of his own claim, and in demolition of other claims, come, as we shall see, at a later stage of the proceedings.

From this meeting on the 3d of August 1291 the whole business was adjourned to June 1292.

The Lord Superior had now in his hands what lawyers call a heavy case; and it cannot be denied that under his directions it went through its stages with all deliberation, receiving a due amount of skilled attention—all recorded so fully that we can even now trace in the policy that ruled the whole, those aims which extended far beyond the mere decision of a legal or genealogical question. Before following up the history of this great litigation, certain public measures incidental to the adjustment of the right of supremacy may be mentioned.

The government of the country was in the hands of guardians, who had been appointed by the Estates. Edward did not wrest their authority from them, but, as Lord Superior, he renewed their appointment as guardians, add-



ing Brian Fitz Allan to their number. He appointed the Bishop of Caithness to be Lord Chancellor of Scotland, with a certain Walter de Amundesham as his colleague in the capacity of Keeper of the Seal. The old seal of Scotland was broken into four pieces, and a new seal was made adapted to the change of conditions. He took the oath of allegiance from all the Scots in attendance; but who these may have been, other than the supporters of the candidates, with some of whom we may hereafter meet, it is hard to tell. He issued an intimation to his Chief Justice of England, that as the two countries were now, by the blessing of God, united, his writs should henceforth be current in Scotland as well as England.

The Lord Superior made an early demand that the guardians should give up the national fortresses to him. This was conceded as a matter of course. We have the orders by which he called upon each governor to give up his charge, and these orders court criticism. In the preamble he does not make display of his office of Lord Superior as in the documents which were not to go to Scotland. He is Edward, King of England, Lord of Ireland, and Duke of Guienne; and he demands delivery of the fortress by assent of the guardians and of the several candidates, and only towards the conclusion does he briefly bring in his title of "Soveryn Seygnur."<sup>1</sup> The names of the superseded governors have a sound as Norman as the names of their successors; yet it is difficult to interpret the race or nation from such a sound, since the Norman manner of naming was the court style, and was imitated by all who claimed high rank. One governor, with a thoroughly Norman title, distinguished himself by a fastidious sense of military honour. Gilbert d'Umfravile, Earl of Angus, in command of the fortresses of Forfar and Dundee, said he had received his command from the Estates of the realm, and demurred to render it up to any other authority. King Edward humoured him by a solemn grant of indemnity for any consequences to be incurred

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<sup>1</sup> Rot. Scot., i. 1.

or elsewhere in Scotland, which might be found to bear on the succession to the crown or on his own rights in reference to Scotland. As the persons who were to give access to the documents, the writ was addressed to Ralph Basset of Drayton, the Governor of the Castle of Edinburgh, who had just been appointed by Edward, to the Bishop of St Andrews, and to William of Dumfries, Keeper of the Rolls. There is a precept to the Chancellor of Scotland to pay the reasonable expenses of these commissioners, as being occupied in a matter peculiarly concerning Scotland; and their proceedings regarding the records passing through their hands are registered with thorough Norman precision. We have a minute of the depositing of a portion of these documents in the treasury of the Castle of Berwick, in which are set forth with all precision the names and titles of the eminent persons present on the occasion, the locking up and sealing of the box in which the documents were deposited, and an inventory of the documents themselves. There is another list of documents authenticated as having been given over by King Edward to John, King of Scotland, best known as John Baliol.

There seems no occasion for questioning the accuracy of these minutes and lists, or for supposing that Edward found anything so emphatically proclaiming the independence of Scotland that it would be his interest to suppress it. The records of a self-governing state do not set forth that it is independent of any other—such a declaration would only lead to a suspicion that it was not quite true. The only document in which the tenor of history would lead us to expect to find a specific declaration of the independence of the crown, is the revocation by King Richard of the admission of vassalage, extracted from King William when a captive at Falaise; and this document is not only fairly titled in the inventory so as to show its tenor, but has been carefully preserved to our own day so as to be published in the great collection of early English diplomacy.<sup>1</sup>

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<sup>1</sup> The careful commissioners notice the defective condition of the seal, as if to save themselves from any reflections on the matter:—

As to the other documents entered in the inventories, but not now to be found, the preservation of the old records of England has not been so well cared for that Scotland can complain of more than her share in the losses incident to a common negligence.

On the other hand, if we are to suppose that Scotland possessed a series of royal and parliamentary records, extending back through hundreds of years, and that it was the interest of King Edward to suppress such a memorial of ancient self-government and independent sovereignty, we shall suppose something extremely improbable. Some collections of old laws certainly were lost, and their loss is to be regretted.<sup>1</sup> In general, however, we may believe that the records followed the introduction of the Normans and their practices into Scotland, and that they were a humble imitation of what had been going on in England since the Conquest.

Such of the documents as may be counted state papers, affecting the interests both of England and Scotland, bear chiefly on the Scots claims upon Northumberland, and the negotiations with the discontented barons of England. Others there are which might have thrown desirable light on the feudal formalities by which the King of Scots endeavoured to stretch his authority over Galloway, the Isles, and the other outlying territories. But the bulk of the collection must have lain in papers revealing the practice of the tenure of property and the administration of justice through charters, inquests, assizes, and other records, many of them referring to merely private and local affairs.

“*Litera Richardi Regis, promissoria Regi Scotiæ quod restituet ei omnia jura sua. Sed vix apparet sigillum.*”

“*Charta ejusdem Richardi Regis de restitutione jurium et castro-  
rum libertatum et literarum Regis Scotiæ.*”

<sup>1</sup> For instance : *Unus Rotulus de Antiquis Statutis Regni Scociæ. Unus Rotulus de Statutis Regis Malcolmi et Regis Davidis. Duo Rotuli de Legibus et Assisis Regni Scotiæ, et de Legibus et Consuetudinibus Burgorum Scociæ et de quibusdam Statutis editis per Reges Scociæ.* Though we have in some shape much of the substance of these burgher laws (see chap. xvii.), it would have been of moment to possess so early a version of them.

Of one thing we may feel assured, that nowhere did King Edward find any writings to help him in his claim of feudal superiority ; if he had found any, they would have doubtless been heard of.<sup>1</sup>

King Edward sought assistance from records in another quarter, but not with much more success. The chronicles of events preserved in the ecclesiastical establishments have been often referred to in these pages. Naturally they chiefly abounded in the houses of the Regulars, who had the more leisure and quietness for such work ; but they were also kept in the chapters of cathedrals and other ecclesiastical colleges.<sup>2</sup> King Edward made a contribution to this class of muniments, by sending for preservation to several religious houses the proceedings relating to the succession to the crown of Scotland, as held in his own court as Lord Superior. Before doing so, however, he drew on these establishments for such assistance as their past records could give him. There are writs issued by him ordering returns, in some instances, of all that their registers or chronicles tell about the relations between England and Scotland—in others, of any information so afforded concerning homage by the King of Scotland to the King of England. Many of the returns made in answer to this requisition have been preserved. So far as the extracts they give from the chronicles belong to true history, it would be a vain repetition to give them here, because, so far as the author accepts them as true, they have found their share in the preceding pages. Out of the matter contained in these returns, and the chron-

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<sup>1</sup> The commissioners' inventories, &c., above referred to, are to be found partly in the *Fœdera* and the *Rotuli Scotiæ*, and in Robertson's *Introduction to the Index to the Charters* (1798). The most authentic rendering of them, however, is in the "*Instrumenta et Acta de Munimentis Regni Scotiæ*," in the first volume of the *Statutes*.

<sup>2</sup> Of the workshops of these chronicles—the "*scriptorium*" attached to each monastery, in which the scribes belonging to the house sat to copy whatever was enjoined them by superiors—an account will be found in Sir Thomas Hardy's Preface to the third volume of his '*Descriptive Catalogue of Materials relating to the History of Great Britain and Ireland*,' xi.

icles of England at large, a case was made out for the superiority of the King of England over Scotland; which can best be told afterwards in an account of the historical narrative in which King Edward brought the question under the consideration of the Papal Court.

## CHAPTER XIX.

## ADJUSTMENT OF THE SUCCESSION

THE ASSEMBLAGE RESUMED—A NEW CLAIMANT: ERIC OF NORWAY—THE QUESTION LYING BETWEEN BALIOL AND BRUCE, AND BETWEEN THE DISTANT DESCENDANT OF THE ELDER AND THE IMMEDIATE DESCENDANT OF THE YOUNGER DAUGHTER—INDICATION OF A LEANING TO THE FORMER VIEW—CONTINUED PLEADINGS—RESOLUTION OF THE QUESTION INTO THE SHAPE OF LITIGATION FOR AN ESTATE—THIS ENCOURAGED BY EDWARD AS LORD SUPERIOR—THE COMPETITORS ADMIT ALL HIS CLAIMS, AND ARE READY TO DO HOMAGE—QUESTIONS OF PARTITION AND COMPROMISE OPENED AND PLEADED—PECULIAR CASE PUT IN FOR THE COUNT OF HOLLAND—THE JUDGMENT IN FAVOUR OF BALIOL—CEREMONIES OF HOMAGE—CEREMONIES OF INVESTITURE IN SCOTLAND—THE NEW KING'S UNPOPULARITY AND DANGER—QUESTION HOW FAR PUT UNDER RESTRAINT—LITIGATIONS APPEALED FROM HIM TO THE ENGLISH COURT—HIS HUMILIATION—A CRISIS.

ADJOURNED as we have seen from August 1291, the great business of the adjustment of the succession was resumed in the beginning of June 1292.<sup>1</sup> A new claim was then given in, which surely must have disturbed the gravity even of the decorous court of the Lord Superior. It was rendered by Eric, King of Norway, the son-in-law of Alexander III., and the father of the young queen who had died on her way home. He offers no explanation of any special Norse or other custom of descent on which he

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<sup>1</sup> In the *Fœdera* the resumption is dated on 1st June, while the adjournment is to 2d June. Sir Francis Palgrave shows that this is the correct date. The 1st of June in that year was Trinity Sunday, and this was doubtless foreseen in fixing the adjournment (*Documents; Introduction*, liii.) So much for the precision of Norman recorders and of editors like-minded.

but these, for some undiscoverable reason, were equally reticent, and would not commit themselves. The king then adjourned the meeting to the 10th of October, announcing that he would in the mean time push inquiries all over the world to get light for his guidance on this vexed question. We can only see in all this that there is something behind it which the record is intended rather to conceal than to explain.

When the proceedings are resumed at the adjourned meeting, the Great Roll of Scotland would leave us no better acquainted with the actual share taken in the discussion by the auditors; but we have information elsewhere of what they actually did.

It was still the policy of the Lord Superior to exhaust, in the special competition between Baliol and Bruce, the question between the nearer descendant by the younger daughter, and the more remote by the elder, before entering on the claims at large. And the first question was, By what law should the question be tried? By the Imperial, meaning the civil or Roman law, or by the laws and customs of England or Scotland?<sup>1</sup> We shall now see how the scheme of the hundred and four arbiters was worked. King Edward put the question to his own twenty-four, not collectively, but personally, in succession, as the votes are taken when the House of Lords sits as a criminal court, presided over by the Lord High Steward. None would admit the imperial law—any reference to that system always enraged the friends of the common law in England—and those who might think otherwise felt it prudent to keep their views out of sight. Most of the referees were quite clear that in an English court they could proceed by no other than English law; and a few sought refuge in the unmeaning compromise, that the law, both of England and Scotland, should rule wherever these agreed with each other. The next question was, Whether there was any specialty in the rank or dignity of this kingdom of Scotland that should exempt it from being

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<sup>1</sup> "An per leges Imperiales seu per leges et consuetudines regni Angliæ vel regni Scotiæ?"

adjudicated upon like the other tenures of the realm? and all answered that there was not. On these two questions King Edward's own council of twenty-four were alone consulted. "Those of Scotland," as the persons selected by Bruce and Baliol were termed, had no opportunity of recording their opinion on these, which of all the questions put were the most eminently national in their character. Yet it was so managed that they too should appear to have had a voice. It was put to the claimants, Baliol and Bruce, and to the eighty of Scotland selected by them, whether they could show any cause why the kingdom of Scotland—a fief of the King of England—should be treated differently from earldoms, baronies, and other tenures. Under nice distinctions in the ways of putting the questions, the broad fact can be distinctly traced that the twenty-four of England were advisers or referees of the supreme judge, Edward himself, as to the judgment to be given, while the eighty of Scotland were merely the advisers of the two claimants as to the position they should take up as litigants—what they should admit, and what they should dispute. Accordingly the eighty are not heard in answer to the questions put; the competitors, Baliol and Bruce, give the answers. These are not very emphatic, but import generally the readiness of both to submit to such decision as their Lord Superior may adopt, one point only being urged with some emphasis—that the kingdom of Scotland cannot be partitioned among several heirs like a private estate.

Having thus in a manner felt the way towards finding a principle, by deciding what law it was to be sought for in, matters were ripe for fixing the principle itself; and the next question was, Whether the nearer descendant of the younger daughter, or the more remote descendant of the elder daughter, should be preferred? The answer, very neatly and distinctly put, was, that the progeny of the elder must be exhausted before that of the younger had any claim. This, as a necessary condition of a pure law of hereditary succession, rules to this day; and it is likely that the deliberations of the august body who assisted the Lord Superior did much to clear up the rules



of succession as an exact science. On the political bearing of the decision, however, the important specialty is that, as in the preliminary question, the English assessors only were consulted.

Taking the principle so established for his rule, King Edward then decided that, as between the two, and as the pleadings stood, John de Baliol had a preferable title to Robert de Bruce. It was then put to the eighty of Scotland if they had anything to say against this judgment. The forty selected by Baliol, when asked one by one, of course assented to it. When it came to the turn of those selected by Bruce, the first on the list—the Bishop of Glasgow—made some faint demur; he was in favour of the claims of Bruce, yet, in the shape in which it stood, he had nothing to say against the judgment; and the rest followed him in assenting. In fact, the decision did not put Bruce out of court or find for Baliol, since all parties were yet to be heard before a final decision.<sup>1</sup> What afterwards occurred may account for Bruce's acquiescence in the interim decision—he had more to hope for in pleading his cause before the Lord Superior than in contradicting him. The material feature in this discussion is, that while it went forth that the question of the succession was remitted to a hundred and four arbiters, eighty of them being of Scotland and twenty-four of England, the eighty of Scotland were allowed no opportunity of giving either a judgment or an opinion on any of the great questions brought to a decision.

Let us now look to the pleadings so far as they have come down to us, and try what instruction may be found in them. They are not to be confounded with the

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<sup>1</sup> "Quod secundum petitiones et rationes ex utraque parte Roberti et Johannis monstratis, quas idem rex coram se et consilio suo cum magna diligentia inspicere et examinari fecit, Robertus de Brus non habuit jus in sua petitione ad regnum Scotiæ secundum formam et modum petitionis suæ. Et similiter dictum fuit dicto Johanni de Balliolo per prædictum dominum regem, quod quoad petitionem suam, idem dominus rex non potest ei respondere ad plenum, quousque alii petentes jus ad regnum prædictum Scotiæ, coram eo in curia sua fuerunt exauditi."

genealogical statements in which the competitors set forth their claims. These are precise and formal, while the pleadings in which each claimant supports his own case to the prejudice of the others are argumentative and discursive.

By far the most illustrious of these competitors—taking them by the estimate of the prevailing court politics of the day—was Florence, Count of Holland. He was the son of that William of Holland who is in the roll of the emperors, though his empire was short and uneasy. The emperor's wife was a Guelf, and otherwise he was connected with those houses which professed to derive their origin from a Roman stock, and looked on the Norman claimants—and their master, the Plantagenet himself—as modern upstarts, the representatives of successful Norse pirates. The connection of Florence with the Scottish royal family differed from that of every one of the other claimants. Ada, a daughter of Henry the son of King David, and consequently a sister of William the Lion, was married to a previous Florence, Count of Holland. Their great-grandson was William the Emperor, the father of Florence, the claimant.

The law of primogeniture had become so far distinct that the descendant of a sister of King William must yield to the claims of his own descendants, unless there were some specialty for excluding them, and the Count of Holland would leave the stage on the mere announcement of his claim, were it not that he attempted to found on some such specialties.

These are curious as exemplifying feudal usages, and they are in themselves peculiar enough materially to vary the monotony of the other claims.

He maintained that Earl David had committed felony, and that his descendants could not succeed to any right through him, being tainted by that remorseless ban of the English law—corruption of blood. As it was put in the pleading by J. de Wossemarmut, the attorney for the Count: "The before-named John de Balliol, Robert de Brus, and John de Hastings can demand no right to the realm of Scotland through the before-named David,

for this same David was a felon, as in respect of homicides, robberies, and arsons of towns and houses : and with banner displayed evilly and disloyally, the castles of his lord the King of England besieged, took, and levelled." The pleadings that have come down to us give no further clue to the occasion of these hostile acts by the Earl David against the King of England ; and from the tenor of history we must infer that David's felony was his fighting against England under his brother, William the Lion, before the Treaty of Falaise. But, for a reason shortly to appear, something more was necessary to open to the Count of Holland a title to that which could not go to Earl David's representatives. He entered this additional plea: Earl David had solemnly renounced his right of succession to the crown—had renounced it into the hands of his brother King William, in presence of the assembled Estates, and had seen it transferred to his sister Ada, the ancestress of the Earl of Holland. The feudal system discountenanced gratuitous renunciations. Its principle throughout was a doctrine of equivalents, and that any owner of a possession or prerogative had simply given it away, was a point not to be easily made out to the prejudice of his heirs. In this transaction, however, there was an equivalent. In consideration of the chances abandoned for him and his, he received an estate in possession, which was yet enjoyed by the descendants of Earl David's three daughters—Baliol, Bruce, and Hastings. This estate the foreign attorney for the Earl of Holland calls Gharirache ; it may now be identified as the district of the Garioch in Aberdeenshire, which is known to have been a domain belonging to Earl David's descendants.

Among many arguments stated against this plea, one does credit to the forensic subtlety of the day : the Count refuted his case by the mere statement of it. His ancestress Ada could only have right of succession as the sister of Earl David, and if he was a felon, his felony excluded his sister as well as his children. Then if Earl David sold his birth-right for this estate in Aberdeenshire, he sold what had already gone from him, and whoever might profit by the felony, the Count of Holland precluded himself from plead-

ing it. To this it was rejoined that the transaction occurred before the felony, and hence the reason for pleading it.

The Count had still farther and equally remarkable matter to state. He said the settlement of the crown on Ada and her descendants was adjusted in something very like a full parliament. "The said King William caused to be assembled all his baronage of Scotland, as well of bishops, abbots, and priors, as earls, barons, and other substantial men of the land. . . . And these the said king ordained, provided, and established, that, if he should die without heir of his body begotten, or if the heirs from him issuing should decease without heirs from them issuing, then they should hold Ada, his sister, as their lady, if she should be living; and if she should be dead, the heirs from her issuing." Thereafter the magnates assembled did homage, and swore fealty to Ada accordingly.

Baliol and Hastings of course denied this transaction; but, providing, as litigants well advised do, for its possibly being true, they said it went for nothing—it was a mere intimation to the tenants on the domain. If William had no power in his own person to alter the succession, these tenants on the domain could not give him such a power. So is met the only reference in the pleadings to the rights of the people of Scotland or of their representatives.

The pleadings of the illustrious competitors are not exempt from the prevailing suspicion that attaches to the statements of litigants generally. Almost every litigant exaggerates his case, and even as to the facts, if they are very telling and are ill-supported, it is necessary often to be sceptical. Most people will, perhaps, doubt the Earl of Holland's story, but some also have doubted, though with less provocation, whether Bruce adhered to truth in maintaining as he did that Alexander II., when afraid of dying childless, named him as his heir, and had the nomination confirmed by parliament. Upon this strong plea Baliol retaliated by charging Bruce with treason against the queen, in that he had taken up arms against her, and actually besieged and taken the Castle of Dumfries.

Bruce could refer to instances of collateral succession,

third daughter, must be postponed to either. He therefore pleaded that the estate—namely, the kingdom of Scotland—should be broken up and divided among the representatives of the heiresses. Bruce had at first contended that Scotland was a sovereignty and indivisible, but he now found it expedient to amend his claim, and put in for his third part of the succession, thus making common cause with Hastings. He was met by an objection not applicable to Hastings—his pleading was inconsistent; for whereas he had founded his original claim on the assertion that Scotland was a sovereignty and indivisible, he now asserted it to be partible, and claimed his share. It would be an utter misunderstanding of the spirit of these pleadings to suppose that Bruce was taunted with this as anything to be ashamed of. His change of position was as natural as the tactic of the litigant, who, having claimed the sum total of a fund, is content in the end to take a dividend of it. Baliol's objection to the entering of such a plea was purely technical: and Bruce held against him that it is every suitor's privilege to put in whatever plea is for his advantage, unless there be an absolute rule of practice against him; and here there could be no such rule, for when he pleaded the indivisibility he was entering a general claim to the sovereignty of Scotland without reference to the claims of others, but now his plea of divisibility was put in by him as a party to a litigation in which Baliol was the one party, and he the other.

The Lord Superior seems to have heard these and other such pleas with patience—indeed to have liked them, for they were gradually breaking down the old historic associations of a separate sovereignty, and preparing for the absorption of Scotland into the realm of England. From this point the pleadings for Baliol are that Scotland, though subject to the superiority of the King of England, yet is a Sovereignty; and he rebuts all comparison between it and several estates referred to as having been divided among heiresses. And here the tone of Baliol's pleading has in it a touch of dignity, as supporting some remnant of separate sovereignty for Scotland, while the

others seek to remove the last shred of it. Thus, as showing the separate sovereignty of Scotland, Baliol sets forth that one who had committed felony in England fleeing to Scotland could not be apprehended at the instance of the English authorities; to which Hastings makes answer, that if such things did occur, they were but an abuse.<sup>1</sup>

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<sup>1</sup> "To the demand by Sir John de Hastings of the third part of the kingdom of Scotland, because that he springs from the third daughter of David, and the kingdom of Scotland is held of our lord the King of England, and because that there never was a king of Scotland anointed or crowned;—Sir John de Baliol maketh answer, that although the kingdom of Scotland is held of our lord the King of England, nevertheless, before the Incarnation of our Lord, and always since, the land of Scotland has been held as a kingdom by kings who have there governed the realm, and by the Church of Rome have been king named and for king held, as also by all kings of Christendom; and royal dignity had, and justice in their land did unto all who of Scotland were. And besides this, he says that the castles, burghs, or towns of Scotland, do not make the king, nor confer the royal dignity, but it is the royal dignity that makes the king; castles, towns, and burghs, and all other things which in the said kingdom are, [are] unto this royal dignity appendant; the which dignity is one [and] entire, and the highest lordship in any land where kings do reign. And since that castles, cities, and burghs and towns, [are] annexed to this royal dignity,—without the which things it cannot be maintained,—just as the principal is non-partible, [so is] neither the accessory nor the thing which unto the principal appertains.

"And as to that there is no king anointed or crowned, the said Sir John de Baliol maketh answer,—that the anointing of a king or the crowning of a king is only the sign of a king, what he ought to be. And this appears in every crown of a king, which is round, and so signifies perfection; and the four flowers of the crown, each signification in itself: the flower in front signifies justice, the behind might; and of the other two flowers, the one signifies perance, and the other prudence. And so the crown does not the king, but it is an emblem, as before is said.

"Besides this, he says that there are many kings who are who are not crowned, as the Kings of Spain, the King of Portugal the King of Saverne, and the King of Vaxen, who hold their kingdom of the King of Almaine, as also the King of Arragon; the which all hold their kingdoms as non-partible. And like as in the time of our lord the King now reigning, the younger brother of the King of Arragon demanded as against the king, his brother, part of the kingdom of Arragon; and because that he would [not] do him the right he demanded, he sent his messengers to the King of France, and to our lord the King of England, and to the King of Spain, and to several

others seek to remove the last shred of it. Thus, as showing the separate sovereignty of Scotland, Baliol sets forth that one who had committed felony in England fleeing to Scotland could not be apprehended at the instance of the English authorities; to which Hastings makes answer; that if such things did occur, they were but an abuse.<sup>1</sup>

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"And as to that there is no king anointed or crowned, the said Sir John de Baliol maketh answer,—that the anointing of a king or the crowning of a king is only the sign of a king, what he ought to be. And this appears in every crown of a king, which is round, and so signifies perfection; and the four flowers of the crown, each has a signification in itself: the flower in front signifies justice, the flower behind might; and of the other two flowers, the one signifies temperance, and the other prudence. And so the crown does not make the king, but it is an emblem, as before is said.

"Besides this, he says that there are many kings who are reigning who are not crowned, as the Kings of Spain, the King of Portingale, the King of Saverne, and the King of Vaxen, who hold their kingdom of the King of Almaine, as also the King of Arragon; the which all hold their kingdoms as non-partible. And like as in the time of our lord the King now reigning, the younger brother of the King of Arragon demanded as against the king, his brother, part of the kingdom of Arragon; and because that he would [not] do him the right he demanded, he sent his messengers to the King of France, and to our lord the King of England, and to the King of Spain, and to several

seems to have felt that the time had come for a conclusion. There is evidence of quick work; all the competitors, save the descendants of Earl David, appear withdrawing their claims as if by a simultaneous vote, though there was doubtless much dealing with them to get them out of the way at the right time. Before judgment, two questions were put to the assemblage, the which, as the Great Roll succinctly tells, brought out answers to the effect that in this question the estate was not divisible, and the descendants of the elder sister must be exhausted before those of the younger have a title. In the fuller accounts of the affair, however, we find that King Edward got answers to four questions from the eighty of Scotland, though we do not see, as in the earlier stage, in what form they were rendered. The first was, Whether the kingdom was partible? and they answered that it was not.

The second was, Whether the estates belonging to the crown were partible? and the answer was, that if they were within Scotland they were not, if out of Scotland they might be.

The third was, Whether earldoms and baronies were partible in Scotland? and they answered, that earldoms were not, as had been found in the succession to the earldom of Athole, but baronies were understood to be partible.

The fourth question was more general, If the kingdom was not partible, and so should fall to the descendants of the eldest, was it consistent with practice to make some provision for the younger daughters or their descendants? The answer was, that there had been no opportunity to provide for such a case in the succession to the crown; but in the succession to earldoms it was usual for the eldest, who took the estate, to make some provision for the younger—but this was matter of grace, not of right.

To complete the history of the great cause it is necessary to give these last particulars, because they are contained in documents evidently authentic; but it would be satisfactory to know more than these documents tell of the spirit in which they were put and answered.

On the Monday after the Feast of St Martin, in No-



vember, there was a great assemblage in the Castle of Berwick to hear the Lord Superior's judgment, which, as all by this time must have well known, was in favour of Baliol. It was a correct judgment according to the law of hereditary descent as now established, and probably the full consideration which the case received may have done much to settle the rule of primogeniture for after-times.

There was still business to be done. The new vassal had to do homage, and instructions had to be issued for his investiture in his fief. These operations are almost hidden in a procession of formalities, devised for the purpose of placing the result of the momentous process beyond any possibility of question or cavil. A piece of business had to be adjusted in the winding-up, small in itself, yet holding a significant meaning. The fees to be paid to the Lord Chamberlain for the King of Scotland's homage had to be adjusted. By an ordinance recorded in the Great Roll it was fixed at twenty pound,—the double of an earl's fee. Thus, often as we find mention of a king of Scots doing homage for something or other, there was no precedent for what he must pay in doing homage for the kingdom of Scotland.<sup>1</sup> And this is in harmony with all the proceedings before the Lord Superior. Their character, as ordinary feudal usages turned to the accomplishment of a new object for which there were no set precedents, is sustained throughout.

There was abundance of further technical procedure in the winding up, but we have now reached the result, and the further formalities make no part of the story. It would not be very instructive to recapitulate them; and in fact, as they are all on parchment, an account of them would be about as uninteresting as an abridgment of any set of title-deeds. The tiresome uniformity of the written documents is varied by one small but significant piece of material work. The seal used by the guardians was broken into four pieces, which were put into a leather bag

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<sup>1</sup> "Ratione homagii quod idem rex Scotiæ fecit regi Angliæ pro regno Scotiæ."

For instance, the fact of the doing of homage is very articulately set forth in a notarial instrument duly attested; and then, to give additional strength to this, there is the narrative of onlookers, who saw the ceremony, and reported what they saw. The new King of Scotland, King John, has to sign a statement—a sort of affidavit—that he performed his homage for his kingdom of Scotland, and performed it willingly, and in honest faith that it was justly due to the King of England as Lord Superior of Scotland.

The new king now went to Stone to be solemnly inaugurated on the Stone of Destiny, after the manner of the kings of Scotland. He brought with him a document or warrant from his Lord Superior, authorising the cere-

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mony, and in the Lord Superior's judgment (see p. 121). Many other notarial instruments—including the information, in the last sentence of the text, about the reason for breaking the Great Seal—are to be found widely in Rishanger's collection. Altogether, it is clear that the pleadings and the miscellaneous documents connected with the great cause must have been very voluminous. A great bundle of the pleadings has come to us from Rishanger, yet they show that there was still much more. Sir Francis Palgrave gives portions of the pleadings different from those preserved by Rishanger—not inconsistent with them, but belonging to a different stage in the great cause.

The Norman scribe or conveyancer who drafted this document found a difficulty, and was perhaps proud of the way in which he got over it. The practice of authenticating business documents by seal had then taken root in England. It came into Scotland, too, among the Normans, but afterwards dropped out of use, yielding to the simple signature in writing. In England, however, the practice grew and flourished so healthily, that at this day, as many people know, there are several kinds of documents of the most important kind, public and private, which would be utterly worthless without having on them a wafer or a piece of circular paper pasted on to represent the seal of the person who signs. The shape of the seal, however, which was to attest King John of Baliol's affidavit of his homage was a more serious affair. Whether the old seal had been yet broken up or not, it was not a suitable one for the occasion, and there was as yet no new seal with the effigy of King John. The plan adopted, after due consideration, was to use King John's private seal, as Sir Johan de Baliol, and to narrate how, in the emergency, that plan was adopted. "*En tesmonie de ceste chose, je ay mis a cest escrit mon seal, que je ay use jесques en cea, pur ceo que je ne avoy uncore autre seal fet desouz tитle e noun du Roy.*"—Rishanger, 368.

mony to be performed, and certifying him as the proper person on whom it should be performed. He was enthroned accordingly on the 30th November 1292. There was still a step wanting to satisfy his master. Homage had been taken of him at various stages of the process; it was now desirable that he should render it as an invested king, and he did so accordingly on the 26th of December at Newcastle, where King Edward received him. He was now sent back to his people, as thoroughly complete a vassal king as the technical skill of the Norman jurists could make him; and his was doubtless deemed the lot of a fortunate and happy man. In that brilliant chivalry—that group of gay adventurers who, unburdened by nationality or other serious creeds, were following fortune wherever they could find it—he had drawn the foremost prize going; but it only cast him into a sea of troubles. It was plain from the first that his people would not bear the rule of a servant of Edward. In the society he had left behind him, no one dared speak of anything but homage and the rights of the Lord Paramount. Among the people now surrounding him these were terms not to be endured, and he was far away from his master and protector. He was thwarted in the selection of his officers, and had to struggle with all the difficulties which subordinates can throw in the path of an unwelcome master. He does not seem to have been a man of much ability—indeed he is liberally termed a fool by friends as well as foes—but his position was one in which courage and ability might have only made mischief. It was said at the time that he was in terror for his safety; and one contemporary writing from the English side compares the poor simpleton to a lamb among wolves.<sup>1</sup>

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<sup>1</sup> In the St Albans Annals, attributed to Rishanger, who, for the reasons already mentioned (p. 155, note), had means of knowing what was going on, there is a lively enough notice of King John's reception: "*Scoti autem, volentes nolentes, illum ut regem animo turgenti moleste suscepunt. Illico omnes famulos suos de sua notitia et natione summovertunt, et alios, ignotos sibi, ad sui ministrationem deputarunt. Regium nomen ei ægre imposuerunt, non spontanea voluntate, sed coacti, et regium officium ei penitus abstulerunt, dicentes, mutue,*

It happened that individual members of the community, in the ordinary pursuit of their personal aims, were the means of rousing the exasperation of the body at large, by bringing home to them in a palpable shape the national degradation. The rumour had gone forth that the king's courts were no longer supreme—there was an authority above them, which could correct their decisions and remedy their acts of injustice. This was glorious news to disappointed litigants. It was desirable, too, that as speedily as possible the Lord Superior should exercise his power as the protector and redresser.

The first to appeal unto Cæsar was Roger Bartholemew, a burgess of Berwick. A certain Marjory Moigne, a widow in Berwick, took proceedings before the Court of the Custodes at Edinburgh on the following statement:—She had lent to William the goldsmith a hundred and eighty pounds sterling, the property of her boys. The goldsmith having died, Roger, as his executor, had taken possession of his estate, but had not repaid the widow. There was a counter-plea, that the goldsmith's estate had a claim for the maintenance of the boys, and that to the rest of the fund the widow had helped herself by taking it out of the executor's strong-box. On these counter-pleas a litigation was built, the result of which was disastrous to Roger; and it was only in human nature that he should seek a remedy, without being hindered by considerations about the sacrifice of his country's independence.<sup>1</sup> King Edward, at Newcastle, named a council to hear the case. King John protested that there existed a treaty providing that no native of Scotland should be required to plead to

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'Nolumus hunc regnare super nos.' Ille autem, simplex et idiota, quasi mutus et elinguis comperta superstitiosa seditione Scotorum, non aperuit os suum; timuit enim feralem rabiem illius populi, ne eum fame attenuarent, aut carcerali custodia manciparent.' Sic degebat inter eos anno integro, quasi agnus inter lupos."—*Annales Angliæ et Scotiæ*, 371.

<sup>1</sup> "Placita apud Edenburgh coram custodibus regni Scotie die Jovis in festo S. Luce Evang. Anno Dom. MCC. nonagesimo primo." Under this title the whole case will be found in Ryley's *Pleadings in Parliament*, p. 146.

any suit, civil or criminal, out of the realm. King Edward said that, supposing there were such an obligation, it could not affect his right to control the judges he had himself appointed ; but he was resolved to remove all possibility of mistake, and, speaking fairly out, proclaimed that he was determined to hear all appeals from the country of which he was Lord Superior. Though a thoroughly practical man, not to be turned from his purpose by parchment, it seems to have been felt by Edward as undesirable that there should remain in writing an agreement like the Treaty of Brigham, by which, in many shapes, he had become bound to observe the independence of Scotland, and had especially engaged that no Scotsman could be cited as a litigant into England. Accordingly, he extracted from Baliol a discharge and renunciation of this treaty for himself, his kingdom, his heirs, and every conceivable being supposed to have an interest in its provisions. While they were at such work, Edward's lawyers extended the cancelling to every kind of document known to exist, or afterwards turning up, in which there might be any condition that could by possibility be pleaded against the exercise, in any circumstances, of his sovereign superiority. This discharge, for greater security set forth both in Latin and French, is the last in "The Great Roll of Scotland." The elaborateness with which it raises a verbal fortification against every possible argument, plea, or quibble, that might be brought against the claims and acts of the Lord Superior, makes it a curious document ; and the study of it might be instructive to a sharp attorney accustomed to prepare obligations for holding people to bargains which they may possibly repudiate as iniquitous.

The pecuniary squabble among the burgess families in Berwick thus expanded into a critical question of national politics. It was followed by another, which, standing alone, would have been of infinitely greater moment, since it concerned rights of succession connected with the earldom of Fife. It involved complex points, both in pedigree and legal formality, grounded on a claim by Macduff, the younger son of the last earl, who, as against his grand-nephew, demanded certain lands which he said his father

had given him. The real importance of the case lay in its finding its way to the Estates of Parliament. The sitting began at Scone on the 10th of February 1293. The judgment was against Macduff, who appealed to the Lord Superior. With these two cases in hand, a sort of rule of court was framed for hearing appeals from Scotland. It involved two remarkable conditions—that in such appeals the King of Scotland was to be cited, and must attend as a party; and that the appellant, if successful, should have damages or reparation for the injustice done to him in the court below.

It is easy at this stage to see that, whatever the ultimate views of King Edward may have been, his immediate object was to subject his new vassal to deep humiliation.

On the Macduff case the King of Scots was cited to appear before the high court of the Parliament of England on the day after the Feast of Trinity, in the month of March. He did not appear; he was afraid to set off on such an errand. He was again cited to appear in October. Meanwhile, in August, there was a meeting of the Estates at Stirling—a meeting which may be called the second Parliament of King John.<sup>1</sup> The business it transacted, so far as we have it on record, related to personal feudal claims. They were of considerable territorial importance. Two of them—the one affecting the domains of the house of Bruce, the other those of the house of Douglas—were appealed to King Edward and his Parliament. It is in the shape taken by the appeals already entered that political importance and historical interest centre.<sup>2</sup> King John obeyed the second summons, going up to England with instructions, whether they were communicated to him by the assembly at Stirling, or otherwise. We see by the

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<sup>1</sup> See the proceedings of the two meetings, during John's short reign, in the first volume of the Scots Acts, p. 89 *et seq.*

<sup>2</sup> A good account of the three litigations in which the houses of Macduff, Bruce, and Douglas were interested, is given by Lord Hailes, who seems to have taken a professional interest in them as a genealogical lawyer, *Annals*, i. 274 *et seq.*

record of the proceedings that he was personally present.<sup>1</sup> As the historians of the English Parliament put it: "This King of Scotland was obliged to stand at the bar like a private person and answer to an accusation brought against him for denying justice."<sup>2</sup> A legislative assembly, whether patrimonial or democratic, can always be trusted with the execution of an oppressive or insulting policy towards a rival or dependent community; and on this occasion Edward was well served—too well perhaps. The King of Scots was treated throughout as a contumacious litigant, failing in respect to the ceremonial court. He stood, however, to the policy to which he had been driven in Scotland. Acknowledging himself the vassal of the King of England, he said he yet dared not commit himself to the matter in hand, or any other affecting the kingdom of Scotland, without consulting the Estates of the kingdom; and when closer pressed, he repeated the assurance.<sup>3</sup> The court then found the party before them contumacious, and guilty of contempt of an aggravated kind, since it was cast at the sovereign who had conferred on him the dignity and authority he enjoyed. He was not only to be subjected in damages to the appellant, but to a special punishment for contumacy. On a preamble, which seems to say that a delinquent ought to be punished by deprivation of the means of holding out in wrong doing, it was resolved that the three principal castles in Scotland, with the towns attached to them, and the royal jurisdiction over them, should be seized into the hands of the King of England until his vassal should give satisfaction for his contumacy.<sup>4</sup> Before this parliamentary resolution passed

<sup>1</sup> "Placita coram ipso domino rege et consilio eius et Parlamento suum post festum S. Michaelis," &c.—Hyly, 137.

<sup>2</sup> Parl. Hist., i. 41.

<sup>3</sup> "Quod de aliquo regnum suum contingente non est suum nec potest hic respondere inconsultis probis hominibus regi sui."

<sup>4</sup> "Juri consonum est quod quilibet puniatur in eo quod ei prebet audaciam delinquendi, consideratum est similiter, quod tria principalia castra regni sui Scotie, cum villis in quibus eadem castra sita sunt, cum jurisdictione regali in eadem, reversione in manu domini regis et seisis remaneant quousque de contemptu et inobedientia predicta, eidem domino regi satisfecerit."

into a decree, King John preferred to his superior, in very humble guise, a petition for delay, until he should consult "*les gentes de mon royaume*," as he called them, promising to report the result to the first Parliament after Easter. The Lord Superior thought fit to grant this petition. But these judicial proceedings were destined to be borne down by political impulses of a more powerful kind; and we have no more records of the appeals against the King and Parliament of Scotland to the King and Parliament of England.



## CHAPTER XX.

## WAR OF INDEPENDENCE TO THE BATTLE OF STIRLING.

EDWARD'S QUARREL WITH FRANCE—THE OPPORTUNITY FOR SCOTLAND—ALLIANCE BETWEEN FRANCE AND SCOTLAND—THE FOUNDATION OF WHAT IS CALLED THE ANCIENT LEAGUE—ITS IMPORTANCE IN EUROPEAN HISTORY—POPULAR CONDITIONS OF ITS ADOPTION ON THE SCOTS SIDE—EDWARD'S RETURN AND INVASION OF SCOTLAND—THE SIEGE OF BERWICK—BALIOL DRIVEN TO RENOUNCE HIS ALLEGIANCE—MARCH NORTHWARDS—EDINBURGH—THE REMOVAL OF THE CONTENTS OF THE ROYAL TREASURY—SCONE—REMOVAL OF THE STONE OF DESTINY—ITS STRANGE HISTORY BEFORE AND AFTER THE REMOVAL—THE BLACK ROOD OF SCOTLAND ANOTHER ACQUISITION—ITS HISTORY—EDWARD'S CIRCUIT AND COLLECTIONS OF HOMAGES—APPEARANCE OF WALLACE ON THE SCENE—WHAT IS KNOWN OF HIM COMPARED WITH THE LEGENDARY HISTORY—HIS CAPACITY AS A COMMANDER AND ORGANISER—HOW HE GATHERED AN ARMY—HIS VICTORY AT STIRLING BRIDGE.

At this juncture an event occurred on the Continent momentous to Scotland, and even to Europe. It furnishes, too, an apt warning of the futility of passing a judgment on the political relations of nations and communities from feudal forms and parchment records. In the records of the court of France for the year 1294, there is an entry to the effect that Edward of England, summoned as a vassal to appear before his lord superior, the King of France, having failed to obey the summons, is punished for contumacy. The forms of feudal style in which this step is recorded, are a fair rival in domineering and insulting language with those of King Edward's scribes in the affairs of Scotland, for France was then in one of its expansive

be secret to many of the Scots themselves. Yet great care was taken to place it on a broad popular basis.

According to a fashion of the day, the diplomatists on both sides were eloquent in setting forth noble motives for what they were doing. The advisers of King John must have surely yielded to a sense of sarcasm, when they made him express his indignation at the undutiful conduct of the King of England to his lawful superior the King of France—perhaps it was a faint attempt to pay off old scores. This was the starting of that great policy which had so much influence for centuries on both sides of the British Channel—the policy of France and Scotland taking common counsel against England. It is just possible that the preservation of Baliol's French estates, Bailleul, Dampierre, Helicourt, and Hernoy, may have had some influence in reconciling him to so strong a measure; but what gave its real stability and power to the league between Scotland and France was their common interest, founded on their common danger. Prominent in this treaty was a royal alliance—Edward, the son of the King of Scots, was to marry the King of France's niece, the daughter of the Count of Anjou. There were stipulations for matrimonial provisions, and very carefully drawn stipulations, that Baliol's son, Edward, should really be his successor in the throne. For the rest, King Philip engaged to protect Scotland from English invasion, by sending an army and otherwise, and the Scots king bound himself to break in on the borders while Edward was engaged in the war abroad.<sup>1</sup> This last was a bargain for wasting, destroying, and slaying, rendered in terms which sound savage through the diplomatic formalities. The engagement was but too literally kept. One rabble army swept the western, and another the eastern, border counties, pillaging, destroying, and burning after the old fashion.

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<sup>1</sup> The substance of the treaty is in some measure preserved in the *Fœdera* (Record edition), i. 822, and in Hemingford, i. 66. The most complete rendering of it, however, is in the first volume of the *Scots Acts* (*Acta Regis Johannis*), p. \*95.

Both returned without any battle or achievement to give the mark of soldiership to their expedition. A course more wantonly impolitic for a country in Scotland's position could not well be devised; but it was a country not only without any conspicuous leader, but deprived, by a succession of singularly adverse incidents, of the machinery which a nation requires for its government even in ordinary times. Bruce, the competitor for the crown, died about this time. His son, the father of the great King Robert, was suspected of treating for the reversion of the rights likely to be forfeited by Baliol; and the raids against England seem to have been directed by Comyn, Earl of Buchan.

It has generally surprised historians that so strong and warlike a king as Edward should have left the French contest a loser rather than a gainer. His fiery spirit was, however, ruled by a deep sagacity. As emperor of all the British Islands, with Ireland, Wales, and Scotland subdued, he would achieve an eminence and power not to be risked for the sake of straggling dependencies on the Continent. Accordingly, he determined at present to concentrate his powers on Scotland.

He marched northwards with thirty thousand foot-soldiers and five thousand mounted men-at-arms.<sup>1</sup> This was a powerful force. The horsemen, clad in complete mail, their actual fighting power enhanced by a superstition that they were unassailable, were then to an army what cannon are now—they could not be too numerous. An army, of course, required other elements, but these never failed in full proportion to the mounted men, whose number was ever limited by the difficulty of procuring them. He determined to pounce upon Berwick—at once the key of Scotland, and the centre of its commercial riches. He forded the river Tweed a few miles above its mouth, and thus got his army clear of the difficulty of crossing a river in the face of an enemy. He now marched

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<sup>1</sup> The chronicles say 4000; but in the diary to be presently referred to the number is 5000.—See Stevenson's Documents, &c., ii. 25.

through ground familiar to him in the conferences about the competition. At that time we have found that he came and went as he pleased, holding his court in the town or the castle of Berwick as suited him; but now the castle or citadel was garrisoned by Scots, and even the town resolved to resist. This presumption made Edward furious; and a chronicler of the day who was deep in the king's confidence, and practically concerned in his projects on Scotland, thought it worth his while to preserve some contumelious taunts with which an audacious citizen aggravated the monarch's potent wrath.<sup>1</sup> It received more ardent aggravation from the burning of some ships which had been sent for a sea attack. The town, with

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<sup>1</sup> This, as given by Rishanger, is perhaps the oldest relic of the Lowland Scots of the day: "*Conse-tim unus e Scotis alta voce cepit convitia et verba probrova regi Angliæ inferre patria lingua,—Kyng Edward, wanne thu havest Berwie, pike the; wanne thu havest geten, dike the*" (p. 373).

In an old French chronicle the taunt is varied, and accompanied by a bit of the personal peculiarity which gave occasion to the nickname Edward Long-shanks—

"What wende the Kyng Edward  
For his langge shanks,  
For to wyne Berewyke  
Al our unthanked?  
Go pike it him,  
And when he it have wonne  
Go dike it him."

And in comment the chronicler says briefly: "*Quant le bon roi Edward oi ceste reproeece taunt fist il par sa prisce qe il assailli les portes, et passa et conquist la ville, et occist par soun gracios poer vynt et cink mille et sept centz.*"—Wallace Papers, 142.

Though we need not believe that these sarcasms had such an effect in raising the fury of the king, the notoriety given to them shows that they must have been effective, though we cannot now easily see their point. The best testimony to their celebrity is, that Peter Langtoft in his chronicle took them up as hits, and deliberately answered them in the spirit of the old taunt of retaliation, that they may laugh who win, since the pick-axe and the dyke at which the others sneered had been effectual:—

"Pikit him, and dikit him, on scorne said he,  
He pikes and dikes in length, as him likes, how best it may be,  
And thou hast for thi piking, mykille ille likyng, the sothe is to se,  
Without any lesyng, alle is thi hething, fallen upon the.  
For scatred er thi Scottis, and hodred in ther hottes, neuer thei ne the.  
Right als I rede, thei tombled in Tuede, that woned bi the se."



Newcastle. Those who now had a stronger hold on him than the Lord Superior, compelled him, instead of giving attendance, to render a written renunciation of his vassalship.<sup>1</sup>

This document did not reach King Edward until after he had completed his work at Berwick. He was probably in high spirits; and it is on this occasion that he is said to have uttered the sarcastic threat—"The foolish traitor, what folly! If he won't come to me, I must go to him."<sup>2</sup> King Edward marched northwards, and the next point at which he met any difficulty was the Castle of Dunbar, close on the sea. It had but just fallen into the hands of the independence party; and we are told that it was taken from them, although an immense army came to the support of the garrison.<sup>3</sup> We are further told that this army was defeated and many prisoners taken. There evidently was not, however, a great battle with organised troops and known commanders pitted against each other. The Scots seem to have been a confused mass, of whose numbers

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<sup>1</sup> The instrument announcing the renunciation of fealty must have created unbounded ridicule among the accomplished feudal draftsmen in King Edward's employment. It is in extravagant contrast to the decorous documents among which it has been preserved. It is a piece of vehement scolding, weakened by the difficulties of putting that kind of expression into the Latin language. The conclusion is utterly inconsistent with feudal logic. On the ground of the outrages and contumelies to which he has been subjected, King John retracts homage and fealty to King Edward, both for himself and any subjects of his who may have committed themselves in the matter. If the homage and fealty were the fulfilment of the King of England's rights, they could not be retracted or withdrawn; and there is nothing said about their being illegal or exacted under coercion. It is easy to see that King John had not such skilful feudal draftsmen at his elbow as those who drew the documents in the Great Roll.—*Fœdera* (Record edition), i. 836.

<sup>2</sup> Epigrammatic utterances by historical characters on critical occasions are notoriously found, when investigated, to be standing on slippery testimony. This saying seems to have no better testimony than Bower's. He, however, evidently gives it unaltered in the form in which it existed in tradition, for it is stuck into his monkish Latin in the original French; and, as Lord Hailes observes, he mistranslates it, losing its point.—*Scotichron.*, xi. 18; *Hailes's Annals*, i. 289.

<sup>3</sup> See Rishanger and Hemingford.

Stirling, where he found the castle deserted, and passed on to St Johnstone, or Perth, where he abode three days. In the adjoining Abbey of Scone he found something which it was well worth his while to remove and keep, and he either took it with him northwards or left it till his return: this was the Stone of Destiny—the palladium of Scotland. It was enshrined in a chair or throne, on which the kings of Scots were wont to be crowned. Its legendary history was, that it was the pillow on which Jacob reposed when he saw the vision of the angels ascending and descending the ladder, and that it was brought over by Scots, that daughter of Pharaoh from whom the Scots line of monarchs was descended. In terms of a prophetic couplet,<sup>1</sup> it was its virtue that wherever it might be placed there would the Scots be supreme; and it will easily be believed that the prophecy was recalled, when in after-days the monarchs of the Stewart dynasty sat on it to be crowned in Westminster.

King Edward was a serious prince, according to the notions of the age, and much given to relic-worship. He chose a spot sacred by its uses, and by the presence of his own household gods, for the reception of the great relic—the achievement of his sword and spear. It was in the chapel built by his father, containing the shrine of Edward the Confessor—where his loved Queen Eleanor and his father were buried, and where he then desired that his own dust should be laid.<sup>2</sup> He intended at once to enclose the relic in a shrine, which should be the coronation chair of

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nut. There is, however, “*una nux cum pede argentea deaurata fracta.*” The removal of these things was so far remembered as to get into the chronicles:—

“*Hic rex sic totam Scotiam fecit sibi notam,  
Qui sine mensura tulit inde jocalia plura.*”—*Scotichron.*, xi. 25.

1 “*Ni fallat fatum Scoti, quocunque locatum  
Invenient lapidem, regnare tenentur ibidem.*”

<sup>2</sup> In contemplating it in its place—which we may now do—to feel the full effect of the scene we should for a moment restore in imagination the altar and its appendages, and lay aside for a time the low esteem in which relics, however sacred, are in those times held.”—Joseph Hunter’s Paper on King Edward’s Spoiliations in Scotland, *Arch. Journal*, xii. 245.

the kings. At first he gave orders for a chair of bronze, then altered his intention, and had it made in wood. Its cover or shrine thus being a seat or throne, altered and adorned from age to age, became the coronation chair of the kings of England.<sup>1</sup>

That the stone was so eagerly seized by King Edward, so tenaciously retained by his successors, and so highly distinguished in its new place, are now the chief testimony to the fact that it was an object of high reverence and honour in Scotland. The oldest annalists evidently make their first acquaintance with its existence when they come to tell of its removal. Whatever revelation they afford of its earlier history is limited to the one item, that at the enthroning or inauguration of Alexander III. he was solemnly placed upon "the stone" reverently preserved for the consecration of the kings of Scotland.<sup>2</sup>

There was, besides the use of the Stone of Destiny, another sanction necessary for the completion of an ancient Scots coronation—the presence and intervention of the

<sup>1</sup> For instance, at the coronation of Henry IV.—"*Introducto rege, et incathedrato sede regali super lapidem qui dicitur 'Regale Regni Scotiæ,' cantabatur Antiphona.*"—Riley, *Chronica Monasterii S. Albani*, 294. In the inventory of articles received by King Edward it is called "*una petra magna supra quam reges Scotiæ solebant coronari.*"—Arch. Journal, xiii. 250.

<sup>2</sup> This ceremony is notable in history from the appearance and participation in the ceremonies of a Celtic seer, see above, p. 21. From what seems a mixture of Celtic and feudal customs, it has been supposed that "the stone" came along with the old traditions of the Irish race who ruled in Dalriada. The history of this palladium has had its full share of skilled investigation—see in the eighth volume of the *Proceedings of the Antiquaries' Society of Scotland*, 'The Coronation Stone, by William Skene, Esq., LL.D., Vice-President S. A. Scot.,' followed by 'Note on the Coronation Stone, by John Stuart, Esq., LL.D., Sec. S. A. Scot.' But the chief result of all inquiries has been to bring forth the ancient and picturesque legendary history that accumulated over this simple stone when it became associated with the history of the War of Independence. The beginning of that history is in the pleading before the Pope by the Scots emissary, Baldred Bisset, to be afterwards noticed. The passage has been thus translated from the record: "The daughter of Pharaoh, King of Egypt, with an armed band and a large fleet, goes to Ireland, and there being joined by a body of Irish, she sails to Scotland, taking with her the



chief of the clan Macduff. We shall presently come across a memorable incident arising out of this ancient rite, but it may be well to say a word about it here, where it will give less interruption to the narrative of events. In the age of the popular histories it was said that the Thane of Fife and head of the clan Macduff had given such material aid in the revolution that dethroned Macbeth and raised King Malcolm to the throne, as to secure the undying gratitude of Scotland and her royal race, manifested in conferring on that house all its mysterious privileges.<sup>1</sup>

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royal seat which he, the King of England, with other insignia of the kingdom of Scotland, carried with him by violence to England. She conquered and destroyed the Picts and took their kingdom; and from this *Scota* the Scots and *Scotia* are named, according to the line—

“ ‘*A muliere Scota vocitatur Scotia tota.*’

—Proceedings, *ut sup.*, p. 81.

The Stone of Destiny has been recently taken out of its case under the seat of the coronation throne. It was found to be an oblong rectangular block of limestone, a good deal worn with handling, and bearing no engraving or inscription. For lifting it there are two rings, one at each end, attached to it, with careful arrangements to prevent their breaking off by the weight of the stone. The mortising is in the centre of each end—equidistant from each side, and from the top and bottom. As it would be inconvenient, however, to hold the rings in such a position, there is a bar or link long enough to keep each ring clear of the upper surface of the stone. The only old description of the stone, given in an English account of *Balioi's* inauguration, will be seen from the above to be inaccurate: “*Concavus quidem, ad modum rotundæ cathedræ confectus.*”—*Hemingsford*, ad an. 1292.

<sup>1</sup> The privileges of the clan Macduff is one of the questions which recent archæologists have been loath to touch. They included “the right of placing the king in his chair at his coronation, the command of the van in the king’s army, and power to compound, by a sum of money, for the accidental murder of a nobleman or commoner by any of them. There still remains, not far from *Lindores*, a stone cross which served as a boundary between *Fife* and *Strathearn*, with an inscription in barbarous verses, which had such a right of sanctuary that a murderer within the ninth degree of relation to Macduff, Earl of *Fife*, if he could reach the cross and pay nine cows, with a heifer, should be acquitted of the murder.”—*Gough's* edition of *Camden's Britannia*, iv. 3. The cross had disappeared when *Gordon* looked for it about the year 1711 (*Itinerarium*, 170). The inscription said to have been upon the cross, concluding with the words “*limpide*

But this is only one of the many attempts to supply, from speculation and invention, the place of lost knowledge. It would be as difficult for us now to solve the secret as it was for the monks of the fifteenth century.

Besides the Stone of Destiny, King Edward got possession of another movable, valuable to him as a weakening of the enemy and a strengthening of his own hand by the possession of a potent relic: this was the celebrated Black Rood or Holy Rood. It was a certified fragment of the true cross preserved in a shrine of gold or silver gilt. It was brought over by St Margaret, and left as a sacred legacy to her descendants and their kingdom, and its removal was a loss to Scotland, second only to that of the Stone of Destiny. The rood had been the sanctifying relic round which King David I. raised the house of canons regular of the Holy Rood, devoted to the rule of St Augustin, at Edinburgh. The kings of Scotland afterwards found it so convenient to frequent this religious house that they built alongside of it a royal residence or palace, well known to the world as Holyrood House. The importance of such a relic to the country having the good fortune to own it, is shown in its finding a legendary miraculous history. As it goes, King David had gone a-hunting into the forest of Drumsheuch, on which now stands Charlotte Square and other parts of western Edinburgh. The day was the commemoration of the exaltation of the cross. The king followed his sport in defiance of the solemn admonition of his confessor, and of course something was to come of his so-doing. He followed, unattended, a stag, which stood at bay and would have done him deadly injury, but the sacred relic at the moment miraculously slid into his hands and the furious animal vanished.<sup>1</sup> This relic being small and portable was

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*lampedo labrum*," is an attempt to produce something that might pass as an ancient unknown language, by a scribe whose use of monkish Latin has hampered his invention. The whole will remind the reader of the drama of 'Macduff's Cross,' one of the latest and least successful of Scott's works.

<sup>1</sup> *Liber Cartarum Sanctæ Crucis*, Pref. This legend is told in Bellenden's translation of Boece (xii. 16), but not by Boece himself,

very useful to King Edward as a sanction in the administration of the oath of allegiance in the course of his journey. Afterwards, when he charged important persons with breaking their oaths of allegiance to him, it was put as an aggravation of the crime that they had been sworn on the Black Rood.

The Holy Rood was afterwards returned to Scotland, and was again lost at the calamitous battle of Neville's Cross, to be told in its proper place.<sup>1</sup>

To return to King Edward's triumphal journey. He was in Forfarshire in the early part of July, and there, at Brechin or Montrose, the hapless King John came to him like a criminal, submitting to be dealt with as the conqueror pleased. Such documents as were deemed necessary to degrade and dispossess him were then drawn with the usual care.<sup>2</sup> He was sent in custody to England along with his son. He was not one of those whom Edward had any reason to fear; and two or three years

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an odd omission. See further the *Miscellany of the Bannatyne Club*, ii. 13.

<sup>1</sup> An annalist of Durham who had seen the Reformation, after mentioning other spoils taken from the Scots in the battle of Neville's Cross, says, "together with 'the Black Rood of Scotland,' so termed, with Mary and John made of silver, being as yt were smoked all over, which was placed and set up in the pillar next St Cuthbert's shrine in the South Alley" of Durham.—This is stated in Sanderson's *Antiquities of the Abbey or Cathedral Church of Durham*, p. 28, 29. But there is a more correct version of it in 'A Description or Breife Declaration of all the Ancient Monuments, Rites, and Customs belonging or being within the Monastical Church of Durham before the Suppression,' printed by the Surtees Society. The passage looks as if its author had seen the Rood, which disappeared in his day no one seems to know how. See also 'St Cuthbert, with an Account of the state in which his Remains were found upon the opening of his Tomb,' by James Raine, M.A., p. 100. The old annalist attributes the legend of the stag and cross to King David II., who was taken prisoner at the battle of Neville's Cross, and for this is duly chastised by Mr Raine, who says: "My author goes on to state that this same David Bruce soon afterwards founded the Abbey of Holyrood in commemoration of the event. The truth is, that monastery was founded above two centuries before his time."—Raine, p. 109.

<sup>2</sup> There is a difference in authorities on the date of his submission, running between the 2d and the 10th of July. This is attributed to the time necessary to complete the proper formalities.

afterwards, as the result of some amicable negotiations, he was delivered up to the representative of the Pope, who saw him quietly settled down in his domains of Bailleul, in France. King Edward stayed a day or two at Aberdeen, and on the 26th of July reached Elgin, where he finally halted. He reached Berwick on his return on the 22d of August.<sup>1</sup>

During this journey King Edward very sedulously garnered in a harvest of personal homages. Attended as he was by his fine army, there was no help for it; all must obey but those who chose martyrdom, and homage did not take so firm a hold on the feudal conscience as to drive it to this extremity. Great territorial potentates and churchmen were specially sent for, others were taken as they fell in the way. As usual, everything that ceremonial in act and formality in parchment could do was done to make these submissions effective. It was set forth on each occasion, in very strong language, that the homage-doer came forward out of a sense of duty and of his own free will to record his allegiance. One thing is peculiar in these homages, that no reason is set forth why homage should be given, though, doubtless, there was a reason for such an omission. There is nothing said about the superiority over Scotland, nor is any closer right of authority assumed. The vassals simply give their allegiance to Edward, King of England, Lord of Ireland, and Duke of Aquitaine.<sup>2</sup>

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<sup>1</sup> The statements about the articles removed by King Edward are taken from Mr Hunter's paper above referred to. The particulars of the journey are taken from an old document brought before the English Society of Antiquaries by Sir Harris Nicholas in a paper called 'A Narrative of the Progress of King Edward I. in his Invasion of Scotland in the year 1296.'—*Archæologia*, xxi. 478; and *Miscellany of the Bannatyne Club*, i. 271. It ends with a statement how King Edward "conquered and serchid the kyngdom of Scotland, as ys aforesaid, in xxi wekys without any more."

<sup>2</sup> The documents connected with the homage, usually called "The Ragman Rolls," have been printed for the Bannatyne Club in a heap, under the title '*Instrumenta Publica sive Processus super Fidelitibus et Homagiis Scotorum Domino Regi Angliæ factis.*' In the introduction will be found the conjectures of the adepts, none of them conclusive, on the etymology of the peculiar term Ragman.

After Edward's return there is a pause, on his side at least, as if he were waiting to see the turn of events. A change may be noticed in the practice of drawing the royal writs. It is not so much a change in old style or form, as the dropping of novelties which recent occurrences had introduced. Ever since the great conference at Norham began, the royal writs relating to Scotland set forth in all ceremony his title as Lord Superior of Scotland. While this is dropped, King of Scotland is not adopted, but in the writs specially addressed to the Scots he speaks of them as those put under his government.<sup>1</sup> One of the earliest statutes passed after his return professed to be a remedy for ecclesiastical abuses, which were said to be rife in England as well as Scotland, and the record of the statute is indorsed with an instruction to transmit it to Scotland. It was clear that the intended policy was gradually to incorporate the new acquisition with the kingdom of England. For the internal administration of Scotland he took some steps obviously necessary for his designs. He took care that the places of strength should be held by persons who neither owned domains in Scotland, nor, from their descent, had an opportunity of forming ambitious hereditary designs there. The most notable of these were Warenne, Earl of Surrey, appointed Guardian, Hugh of Cressingham, the Treasurer, and Ormsby, the Justiciar. The strongholds were commanded and garrisoned by subjects of England equally free of Scots influences. It is to this period that we must assign the raising of the bulk of the oldest castles in Scotland. The style in which they are built, indeed, is significantly called the Edwardian, to distinguish it from the earlier Norman style used by the Conqueror and his followers. As we have no distinct evidence of the persons by whom these buildings were raised, it seems a rational

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<sup>1</sup> As in the address or proclamation on his departure to Flanders, beginning, "Rex dilectis et fidelibus suis universis et singulis et aliis quibuscunque de regno Scotiæ;" and he expresses a hope that his expedition will be "pro defensione et communi utilitate populi regimini nostro commissi."—*Fœdera* (Record edition), i. 180.

supposition that they were chiefly the work of the English authorities.

The people thus at last found alien masters at their door, and were sullen and suspicious. The foreign soldiers naturally conducted themselves as all military occupants of a subjected country do. The results were not of a kind to shape themselves into particular narratives; we only know that there was strife and confusion throughout. King Edward writes to Cressingham that all efforts must be made to bring to justice the wicked rebels, homicides, and disturbers of the peace with whom the land swarms, and to crush the rebellion. For this he is required to collect all the money he can raise, and to spend it. His obedience to this order for rigid taxation would do little to allay the growing storm.

It is at this time that the far-renowned William Wallace steps upon the stage. We know nothing of precedents which might lead us on to anticipate his public history; he comes to do his part like any actor who may just have figured in any other character, tragic or comic. His father was a knight and a landowner, having the estate of Ellerslie, in Renfrewshire. He had himself been knighted, and was thus, by the etiquette of Norman chivalry, as well entitled to lead armies as any noble, or even monarch, of his day. To which of the several races inhabiting Scotland his family belonged, is a question that has been deemed interesting, since he was certainly the representative and champion of that remnant of the Saxon, or pure Norse inhabitants of Britain, who had not yet been subjected to the southern yoke. But social position was of more weight in this matter than mere origin. He may have been of Norman descent; there were Wallaces scattered over England, and one came in with the Conqueror. But in reality the Normans were of the same northern Teutonic blood as the Saxons; and this it was that made them in the end assimilate into that well-assorted community which has made the England of the fifteenth and later centuries. The danger to the liberties of a country like Scotland was among those princely Norman houses which had domains in Scotland and England, perhaps

also in Ireland, in France, and in Flanders. The position of Norman William to the chiefs among his followers and supporters had scarcely been that of sovereign and subject, in the later acceptation of the terms. They were all in a common adventure, and he was but the chief adventurer. It was long ere the crown became strong enough to widen its distance from these great houses; and they showed the old spirit in the Barons' Wars, and on several other occasions. Before the time we are dealing with, the great bulk of the houses founded by the adventurers had gravitated into a position among the mere landed gentry or aristocracy of England; but there were still a few with domains scattered over Europe which had princely tendencies, and considered themselves entitled to put in their lot for thrones. It was the misfortune of Scotland at that time, that the natural representers and leaders of the country—the nearest relations of the old royal family—were all men of this class, and could not be trusted with the national interests. If a family had been living among the Scots people from generation to generation, it mattered not whether the first who pitched his tabernacle there had come from Denmark or Friesland—whether he had been one of the Saxons of England, seeking refuge from the tyranny of William's forest-laws, or a grandson of one of William's own followers. The interests and feelings of such a family would be in harmony with those of the commonalty, of which they were a part; and it was of such a family that William Wallace came.

The later romancers and minstrels of his native land have so profusely trumpeted his personal prowess and his superhuman strength, that part of their eulogy has stuck to history.<sup>1</sup> Whatever his personal strength may have

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<sup>1</sup> "Wallace had an iron frame. His make, as he grew up to manhood, approached almost to the gigantic; and his personal strength was superior to the common run of even the strongest men."—P. F. Tytler, vol. i. ch. ii.

Thomas Campbell sang, in unison with the old minstrels, how—

"The sword that was fit for archangel to wield,  
Was light in his terrible hand."

It is believed that this sword may still be seen—in several places. The

ghers of their day. It was a service to the world that this insolent and aggrandising spirit caught a check almost simultaneously in three places—Switzerland, Flanders, and Scotland.

In this last country, as we have seen, the conditions were peculiarly discouraging. Not only were there no leaders to be trusted, but the country had enjoyed peace—a peace scarcely disturbed for more than a hundred years. During this time the English had been ever fighting—in Ireland, in Wales, in France, and among each other in the Barons' Wars. The end showed, however, that the stuff of which a warlike nation is made abounded: in fact, historical conditions had made the Lowland Scots the very pick of the hardy northern tribes. They were made up of those who had left their homes whenever they found tyranny, or, as it may be otherwise called, a strong government, pressing on them. Thither came those who had successively swarmed off before the pressure of Varus, of Charlemagne, of Gorme the Old, and of Harold the Fair-haired. And the last, and perhaps the stoutest and truest of all, were the Saxon peasants who had sought refuge from the iron rule of the Normans among a kindred people still free.

Of the character in which Wallace first became formidable the accounts in literature are distractingly conflicting. With the chroniclers of his own country, who write after the War of Independence, he is raised to the highest pinnacle of magnanimity and heroism. To the English contemporary chroniclers he is a pestilent ruffian; a disturber of the peace of society; an outrager of all laws and social duties; finally, a robber—the head of one of many bands of robbers and marauders then infesting Scotland. But Edward's government and organisation were not of a kind to permit mere soring and robbery, and there were far more formidable powers at work than those which the administration of criminal justice could cope with. The people were all exasperated, and all ready to rise against their new oppressors, wanting but a leader; and the course of events brought them that leader in Wallace.

Among the many who have chronicled his fame, Harry .



whom Edward had made Earl of Clydesdale and Sheriff of Ayr.

The story is not, on the whole, improbable: we can easily believe in such a man being driven desperate by insults and injuries to himself and to those dear to him. But the latter portion of the story is confirmed in a curious manner. About sixty years later, a Northumbrian knight, Sir Thomas de Grey, had been taken prisoner in the Scots wars, and was committed to the Castle of Edinburgh. There, like Raleigh, he bethought him of writing something like a history of the world; but it fortunately gave a disproportionate prominence to events in or near his own day, especially those in which he or his father participated. He tells how, in the month of May 1297, his father was in garrison at Lanark, and that Wallace fell upon the quarters at night, killed Hazelrig, and set fire to the place. The father had good reason to remember and tell about the affair, for he was wounded in it, and left on the street for dead. Had it not been that he lay between two blazing buildings, he would have died, wounded as he was, of exposure in that chill May night, but he was recognised by his comrade, William de Lundy, and tended by him till he recovered.<sup>1</sup> Further, it was charged against Wallace, when indicted in London, that he had slain Hazelrig and cut his body in pieces.

The influence of Wallace's nature brought around him companions. He got by degrees a little band capable of harassing outlying parties of Edward's soldiers. He and his followers were emboldened at last to the flagrant audacity of making a raid on the great justiciar, Ormsby, when holding a court at Scone. The justiciar took to his

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<sup>1</sup> Scalacronica, 124. We are told by the editor of the Chronicle that Sir Thomas de Grey, having claimed some reward for his services against the Scots, King Edward II., in the year 1319, issued letters patent, reciting that "he had given to Thomas de Grey and to his heirs for ever, in consequence of the good, loyal, and long-continued service of the granter against the Scotch, an hundred and eight acres of arable land, and eight acres of meadow, with their appurtenances, in Howick, near Alnwick."—Introduction, xx. Thus the Cumberland Greys acquired the possessions which gave them the title of Howick.

the first of these is the fact that the system is not self-sufficient. It is necessary to import a large quantity of raw materials and to export a large quantity of finished goods. This is a disadvantage, as it makes the system vulnerable to fluctuations in the world market. The second disadvantage is that the system is not very flexible. It is difficult to change the system once it has been established, and this makes it difficult to adapt to changing circumstances. The third disadvantage is that the system is not very efficient. It is often wasteful and costly, and this makes it difficult to compete with other systems.

There are, however, some advantages to the system. The first advantage is that it is very simple. It is easy to understand and easy to implement, and this makes it a good choice for small businesses. The second advantage is that it is very reliable. It has been used for many years, and it has a proven track record. The third advantage is that it is very cost-effective. It is often cheaper than other systems, and this makes it a good choice for businesses with limited budgets.

There are also some disadvantages to the system. The first disadvantage is that it is not very secure. It is easy to hack, and this makes it a poor choice for businesses that handle sensitive information. The second disadvantage is that it is not very scalable. It is difficult to expand the system, and this makes it a poor choice for businesses that are growing rapidly. The third disadvantage is that it is not very flexible. It is difficult to change the system once it has been established, and this makes it difficult to adapt to changing circumstances.

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taken in a wide sense; but from the number of mounted men it is clear that the force was not very strong. It passed through Bruce's country of Annandale, and on to Lochmaben, where at night there was alarm of an enemy at hand; and we are told that the army burnt their wooden huts to get light and see what was the matter. The force marched on by the west coast, passing through Ayr to Irvine, where an event occurred which has a place in diplomatic record. It requires a word of preliminary explanation.

Before this time, as we have seen, Bruce, the competitor for the crown, died an old man. The head of the house at this time lived, in fealty to Edward, on his estates in England, content, as it would appear, to enjoy the advantages which his rank and wealth gave to him, and disinclined to cast his lot in troubled waters. His son, who was to become the hero-king, lived in Scotland as lord of his mother's domains in Carrick. He was of a temper more restless and ardent; and the convulsive political conditions by which he was surrounded tended to excite him. Independently of the vision of a crown that could not but haunt him, he was one of a class for whom much allowance should be made. Their taste and training, in many cases their interest too, attached them to the brilliant court of the King of England. Yet in Scotland, where they had estates, there was a determination not to be subjected to that political arrangement which to them, to some of them at least, would have been the most pleasant. Hence we find those dubious movements and uncertain aims which have subjected them to much infamy as the betrayers of their country. Historians seemed to have found in this broad charge a sort of revenge for the perplexities which they have had to endure from the indistinct and unaccountable movements of many of these barons. We shall probably have a better notion of the truth, if, instead of estimating exactly the amount of honesty and patriotism that has influenced each of them, we follow the course of their actions in a spirit of indifference towards the personal motives at work. When the country became more and more restless, and it was

The first of these is the fact that the system is not self-sufficient. It is necessary to import a large quantity of raw materials and components from abroad. This is a serious disadvantage, especially in the case of a country like India, which is a net importer of foreign exchange. The second disadvantage is that the system is not very flexible. It is not possible to make any changes in the system without the approval of the government. This is a serious disadvantage, especially in the case of a country like India, which is a net importer of foreign exchange.

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We have no reason to suppose that Wallace was present on this occasion. His name is not mentioned by the contemporary English chronicler, whose account of the affair is the most minute, and the source of all others.<sup>1</sup> Wallace seems, indeed, to have been in the north laying his plans for resisting the invading army at the Forth, or the Scots water, as it was still called. This is important, because it has so often been said that his army was distracted by the divisions caused by the nobles in his ranks, who were jealous of his supremacy. To complete the character of a great commander, he should be too strong-handed to permit dissension in camp, however many enemies he may have outside; and better evidence is needed ere we allow such a blot on the generalship of Wallace.

The affair of Irvine added to the number of the feudal leaders of the Scots whom Edward held in hand, and he thought he might with safety take his intended departure for Flanders. While he was there Wallace organ-

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<sup>1</sup> Hemingsford, i. 123. The discovery of the blunder of a copyist which has tended to support the notion of Wallace having been concerned, is one of the achievements of the minute eye of Sir Francis Palgrave. Let him tell his triumph. "The first of these instruments, or the submission, concludes with these words: '*Escrit a Irewin* le noevime jour du mois de Juyl en le an del regne le Reys Edward vintime quint' (p. 198). This passage is thus printed by Rymer (i. 868): '*Escrit a Sire Willaume*, le noemme jour du moys de Juyl en le an del regne le Reys Edward vintime quint.' The original is somewhat defaced, and Rymer, or his transcriber, not being conversant with the character, nor very familiar with the language, in reading the word *Irewin*, mistook a partially-effaced flourish of the capital *I* for an *S*, and the three parallel strokes of the concluding syllable '*in*' for the letter *m*, thus altering the word to '*Sirewm*.' The next stage in error was to divide this word into *Sire Willaume*, and thus the printed text was formed. Upon this text, appearing in an authentic publication, the subsequent writers of Scottish history had to work, and it was quite natural to suppose that *Sire Willaume* could be none other than Sir William Wallace. Hence Lord Hailes observes, 'The meaning is, as I presume, that the barons had notified to Wallace that they had made terms of accommodation for themselves and their party. But Wallace scorned submission,' &c. (i. 302.) The whole of this reasoning, and much more, is therefore grounded upon the false reading of a modern copying clerk." — Documents and Records, introd., cxxiv, cxxv.

a churchman, but much given, as it was said, to the pomp and circumstance of glorious war. He had been the soul of the English oppression in Scotland, and was very hateful. There are stories told of the Scots having taken off his skin and distributed it in morsels—not by any means, as the monkish chroniclers think it right to explain, out of veneration for them as relics. One can easily believe this to be true, while wishing that no worse things had to be recorded about the contest to which England and Scotland were now fairly committed.

## CHAPTER XXI.

## WAR OF INDEPENDENCE TO THE BATTLE OF ROSLIN.

NATIONAL INFLUENCE OF THE BATTLE OF STIRLING—WALLACE'S DEALINGS WITH THE HANSE TOWNS—RAIDS INTO ENGLAND ON THE EAST AND THE WEST—WALLACE'S PERSONAL CONDUCT—PROTECTION TO THE MONKS OF HEXHAM—BECOMES GUARDIAN OF THE KINGDOM—EDWARD'S SECOND GREAT INVASION—SIEGE OF DIRLETON—BATTLE OF FALKIRK—DISAPPEARANCE OF WALLACE FROM HISTORY—QUESTIONS AS TO HIS HAVING GONE TO FRANCE AND ROME—FRENCH AND ENGLISH DIPLOMACY—FRANCE AND SCOTLAND BALANCED AGAINST EDWARD AND THE FLEMINGS—THE QUESTION OF THE INDEPENDENCE OF SCOTLAND BEFORE THE COURT OF ROME—A PAPAL EMISSARY—HIS ADVENTURES ON THE BORDER—THE CURIOUS CASE LAID BEFORE THE PAPAL COURT BY KING EDWARD—ACTIVE WARFARE RESUMED—THE SIEGE OF CAERLAVEROCK—ITS HISTORY A TYPE OF THE SIEGES OF THE DAY—BATTLE OF ROSLIN.

THE later chroniclers tell us how Wallace, having the country at his command, set to and adjusted thoroughly effective systems for the official organisation of the executive, the administration of justice, and the transaction of local business by properly constituted local boards. But in the emergency the defence of the country would be the pre-eminent consideration, and so we are told how he divided the kingdom into military districts, and appointed a muster-book of able-bodied men between the ages of sixteen and sixty to be kept in each shire, barony, lordship, town, and burgh. The persons who mention these things lived at a time too late to have practical knowledge of them; and we all have practical knowledge of the fact, that it has been an established historical etiquette

to attribute such organisations to the hero of a country's idolatry when the fortune of war has given him the upper hand.

There is, however, one little authentic vestige of his public conduct after the battle, which shows him prompt to help the cause of peaceful progress. We may look on this battle as the point at which a change in national feeling was completed. The Scots had no natural antipathy to their English neighbours, who were of the same race as themselves. They were jealous of the interference of the Norman kings and nobles with their institutions, but in this they made almost common cause with the Anglo-Saxons. Gradually, no doubt, since soldiers and tax-gatherers had come among them, there grew a dislike of the English people. Now the two had measured their strength in a stricken field—a great inspirer of national animosity; and from this time we may date that obdurate hostility, the last vestiges of which have almost been seen by the existing generation. The victory was an immediate and a permanent encouragement to the Scots. Through all the calamities and reverses they had afterwards to endure, it reminded them that the enemy so haughty and so powerful had been beaten, and might be beaten again.

Its immediate influence was so powerful as to clear the country of the invaders. All the strongholds were recovered by the Scots—even Berwick, the loss of which was very vexatious to Edward, for he had given instructions to make it impregnable with stone walls, in addition to his earthen mound, and the instructions had been neglected.

There lately was found in the old commercial city of Lubeck a short document, which happens to be the only authentic vestige of Wallace's movements immediately after the battle. It is dated 11th October 1297, and is a communication to the towns of Lubeck and Hamburg in the name of Andrew de Moray and William Wallace, generals of the Army of the kingdom and community of Scotland. They thank the worthy friends of their country in these towns for services and attentions which the



unfortunate condition of their country had hindered its people from duly acknowledging. They assure their distant trading friends, however, that commerce with the ports of Scotland will now be restored; for the kingdom of Scotland, thanks be to God, has been recovered by battle from the power of the English.<sup>1</sup> We have seen that Scotland was becoming an actively trading nation before her troubles broke out. And this little document is a touching testimony to the prevalence of those peaceful pursuits, which were so cruelly crushed by the remorseless invaders; we have to wait many years ere we again find the trace of foreign trade in Scotland.

Indeed, very evil days were close at hand. A famine fell on Scotland, and, whether for food or vengeance, bands of armed men crossed the border, and played havoc in Cumberland and Westmoreland, over the old disputed district. The English chronicles—which are the only contemporary accounts of this affair—are confused, as all accounts of plundering and devastating inroads, whether by friend or foe, must needs be. Language and imagination are almost exhausted by the monkish chroniclers in describing the cruelties and brutalities of these rieviers; and yet the accounts of their deeds want originality, for there had been a sort of terrible formula for describing the work of a Scots invading army from the Battle of the Standard downwards. Of cruelty and rapacity there was no doubt a fearful amount, but it must be remembered that the suffering side had the telling of the story; and it was a policy with the English clergy, who were also the historians, to make out that the Scots were sacrilegious as well as cruel, and reserved their special tortures and indignities for holy men and women.

Wallace was at one time in the host taking command. From the tenor of the confused narratives, it might be inferred that the marauders had swarmed over the border before he joined them, and this is almost proved by dates. The letter to the corporations of Hamburg and Lubeck was written, as it says, in Scotland, bearing date 11th

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<sup>1</sup> Wallace Papers, 159.

October; and when he was at Hexham, on the 7th of November, he found the place devastated by a previous inroad. At all events, those memorials of the sad business which are most distinct and authentic are thoroughly honourable to his memory. After a hundred and sixty years, the unfortunate Priory of Hexham was again wasted, and, as the annalists of the house tell us, just when they were exulting in the possession of noble additions to their buildings. When Wallace went there only three monks were found, cowering in a little oratory which they had made for themselves in the midst of the devastation; and when some one asked where their treasury was, they said the Scots horde had already carried it off, and they who had removed it would know where to find it. Then we are told how Wallace desired one of the monks to celebrate mass, and gave reverent attendance on it, yet could not take such order but that when his back was turned his rough followers plundered the altar of what sacred symbols were yet left. What we best know of his conduct on this occasion is, that he granted two writs of safe-conduct—the one to the prior and convent generally, the other to one of the monks, with a man-at-arms and two domestics, when on a journey to hold an interview with him. He had then associated with himself in the nominal command a young hero, afterwards renowned, Sir Andrew Moray. To him, in the preamble, he gives precedence, beginning: “Andreas de Moravia et Willelmus Wallensis, generals of the army of the King of Scotland, in the name of the illustrious Prince, the Lord John, by God’s grace King of Scotland, with the consent of the commonalty of the realm.” These writs are among the few luckily preserved morsels of real evidence which, in the minds of some, save the career of Wallace from being treated as that of a mythical person.<sup>1</sup>

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<sup>1</sup> That these documents should be given by Hemingford (i. 135) in a shape to stand criticism, is a testimony to the general credibility of that chronicler’s narrative; and not the less so that he can scarce ever mention Wallace without calling him *ille latro*, which may either mean that robber or that cut-throat. A critical friend has noted,

After these affairs, we find Wallace acting with the title of Guardian of the kingdom of Scotland, and leader of the armies of the same, in name of King John, and with consent of the commonalty. Whether or not, as the later chroniclers say, it was by a parliament held in Selkirkshire that he was raised to this dignity, we may conclude that it had the consent, in some shape or other, of the burghs and other portions of the Estates. There is just one writ by the Guardian extant—it appoints Alexander of Scrimis-chur, or Scrimgeur, to be constable of the Castle of Dundee, and invests him with certain lands on the hill above

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however, that the vituperative epithet is not to be found in references to Wallace later than the affair of Hexham. See on this inroad the chronicle of Henry of Knyghton, by Twisden, 2520. He tells naturally enough how the depredators, bullying at Carlisle, said they appeared in the name of "William the Conqueror;" and when asked for an explanation of so startling a title, said he was William Wallace, the King of Scotland's general. In Prynne's Records (iii. 542) there is an account which rather discredits itself by representing John, King of Scotland, as the leader of the raid. It is during this inroad that the English chroniclers tell us how seven earls of Scotland took part with their followers—the Earls of Buchan, Monteith, Strathearn, Lennox, Ross, Athole, and Mar, along with the son of John Comyn. We are told that they collected a great force in Annandale—Bruce's country. This seems to have been a separate expedition from that commanded by Wallace. They attacked Carlisle and burned the suburb. They tried to fire the gate, but unsuccessfully; and we are told how a certain Galwegian, having reached it with a blazing faggot, was speared by men posted above the gate. It happened that a Scots riever was at that time a captive in Carlisle, and knowing that his countrymen were besieging the town, he co-operated with them by setting it on fire, and burning a large portion of it. We are told that the citizens—women as well as men—manfully defended the walls with stones and arrows, and drove the assailants away. In that expedition the Scots were aided by an ally of a remarkable kind—Robert de Ros, the English governor of Werk, who deserted his post and the service of Edward, and showed his zeal in the cause of the Scots by surrounding a force of a thousand Englishmen, at a place called Prestfen, and putting them to death, save a small number who escaped; this is not the sole instance in which a disposition was shown in the northern counties to make common cause with Scotland. This episode of the siege of Carlisle by the seven earls is not to be found in the usual chronicles and histories. It occurs in the *Scalacronica*, 122, and is given in more detail in Rishanger, 156. Both give the titles of the earls, and in the same order.

proached the character given of it by the English chronicles of the day, was magnificent and overwhelming. There were at first 7000 mounted men-at-arms, 3000 of them in coats of mail, and they were afterwards joined by 500 from Gascony. After this the number of footmen was of little moment. Eighty thousand is spoken of as the number. Among them were many of the king's Welsh and Irish subjects; these were not of much repute in regular war, but it was generally deemed a matter of small moment from what material the ordinary rabble of foot-soldiers were collected.

The army met an interruption at the Castle of Dirleton, near the promontory of North Berwick. At all events, if it were not taken, they would leave a strong place behind them garrisoned by the enemy, and it was not easily taken. Its ruins, which may now be seen, are of a building of that age, and it is possible that it may have been the first of the new class of fortresses besieged in Scotland. We know nothing, unfortunately, of the details of the siege—merely that the indefatigable warrior-bishop, Anthony Beck, found the taking of the place a long and difficult business. It is noted that the besieging army, running short of provisions, were able to supply themselves from the produce of the surrounding fields, and this has been taken as evidence of the fertility of the south of Scotland at that time.

Ere the king and his army reached the Forth, near Edinburgh, they saw the policy of their enemy, and were somewhat unnerved by it: it was to leave them to tread a desert where there was neither food to eat, nor man to direct them on their way. The policy was, indeed, almost effectual, and only some small chances in their favour saved them from a miserable retreat.

The crisis must have been a tantalising one to Wallace. He could muster but a poor force—about a third of the enemy's on the whole, and only a thousand mounted men. A battle was ruin to him, but he believed that if he waited the starved army of the invaders would have to retreat, and his force was sufficient to do them abundant mischief by harassing them as they went; but fortune was

against him. Hovering in the neighbourhood to catch the opportunity when it should come, he was discovered. Two knights, and it is noted that they bear Scots titles, are said to have sent a boy to Edward to tell him where the Scots army was to be found.<sup>1</sup> No time was lost in putting this information to use. The army, marching from Kirkliston, required to spend a night near Linlithgow, and, king and all, they lay upon the bare ground. King Edward was a thoroughly working soldier, and it was not the notion of his age that it behoved a commander, especially if he were of royal rank, to isolate himself in splendours and comforts from the vulgar hardships of the field. That night a page mishandled a horse near the king, and the beast's hind legs struck and wounded him, breaking two ribs as some authorities say.<sup>2</sup> This made no interruption; the king reserved the tending of his wounds until he was through the momentous business of next day.

There was no chance for Wallace in retreat—no alternative but to fight. In the previous battle the great point made was the selection of the ground; in this he showed even more of the tactician in the disposal of his troops where they were compelled to fight. It is a strong testimony to skill in the ordering of an army that it should be not only distinct, but hold a shape of which we can estimate the merit by knowing how valuable it is in modern

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<sup>1</sup> This incident has been founded on as one of several which show the Scots aristocracy of the day as traitors to their country. The authority for it is in a passage in Hemingford, certainly one of the oddest in which a crisis in a nation's fate has ever been told: "*Ecce duo comites, Patricius S. et comes de Anegos, die proximo ante festum Mariæ Magdelinæ, summo diluculo ad Episcopum Dunelmensem venientes, et cum eis episcopus statim ad regem statuerunt puerum exploratorem coram rege, qui diceret 'Salve rex,' et rex ad eum 'Salve.' Puer etiam intulit 'Domine mi rex, exercitus Scotorum et omnes hostes tui non distant a te nisi per sex lucas modicas juxta Faulkirke,'*" &c. (p. 162). The account is repeated in the same words by other chroniclers. Patricius S. is set down as the Earl of Dunbar. This is rather slender evidence on which to identify two Scotch earls, and then find them guilty of treachery to their country.

<sup>2</sup> Walsingham, 75.

warfare. The English chronicler describes the marshalling of the Scots army with such clearness that a picture or diagram would not have improved it. Taking up a slightly inclined plane, Wallace drew up his small body of mounted cavaliers in the rear, and distributed the footmen into circular clumps. In each circle the men knelt down—those on the outer rim at least—and held their lances obliquely erect; within the circle of lancers were the bowmen. The arrangement, save that it was circular instead of rectangular, was precisely the same as the “square to receive cavalry” which has baffled and beaten back so many a brilliant army in later days. It seemed at first as if Wallace’s circles were to have a similar history. The first efforts against them were ineffectual, and the horsemen seemed shy of charging the thick clumps of spears. The inequality of force was too great, however, to be neutralised by skill. The charges of Edward’s mounted horsemen at last crushed the circles, one after another, and when this was done the rest was mere rout and slaughter. Wallace managed to carry a small body out of the field, and marched to Stirling. They found it useless to attempt to hold the place; so, destroying what they could, they marched on no one knows whither, the commander and his followers alike disappearing from the history of that war.

The victory was a profitless one, except for its depressing influence on the spirit of the Scots. Edward had not prepared himself to keep an army in a country so utterly stripped of food. He swept the country to the right and left, accomplishing nothing but destruction. The population appears to have been drawn off beyond the Forth. What Edward might have found there we do not know, for he did not venture northwards; and he was at last compelled to drag his starved army back to Carlisle.

From this time we hear no more of Wallace concerning himself in active life in Scotland. Much has been said of the cabals and aristocratic jealousies which drove him from the office of Guardian, but in reality the whole affair

is a secret to the present day. The guardians were kept up as an institution in John Comyn of Badenoch and John de Soulis. The tendency of events was deepening the gulf between England and Scotland, and rendering double allegiance ever more hopeless. Hence the great feudatories who had domains in both countries had to make their selection so as to hold by the one and abandon the other, but they naturally took the alternative gradually and reluctantly.

The romancers after this time send Wallace to France, where he comes out as the true knight-errant in feats with lions, robbers, and pirates. Here, again, some vestiges of evidence lately found tend to confirm the material fact that he sojourned in France. In a mere list of documents found in his possession when he was carried captive to London, was a letter of safe-conduct to him from King Philip of France.<sup>1</sup> While he was in power, indeed, Wallace kept a sort of ambassador in France in William Lamberton, Bishop of St Andrews. Lamberton was, in fact, his own bishop. When the see became vacant, William Comyn was the candidate favoured by King Edward; and as this rendered it necessary that the national party should have another person, Lamberton was made bishop. His acceptance was one of the charges brought against him by King Edward in an ecclesiastical process at the Vatican, and other charges set forth that the bishop had gone to France, where he advocated the cause of the rebellious Scots and excited the traitor Wallace by prospects of French aid.<sup>2</sup> That Wallace should have had a safe-conduct to France is not sufficient to inform us that he went there and used it, but the probability that he did so is much strengthened by finding that he got credentials from France onwards. A very minute scrap among documents in the Tower of London, without date, was found to be a letter by Philip, King of France, to his representatives at the Court of Rome, recommending to them his good friend William le Walois, of Scotland, Knight, and desiring them to do what in them lay to expedite the business he had to

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<sup>1</sup> Palgrave Documents, cxcv.

<sup>2</sup> Ibid., cxvi.

transact at the Court of Rome.<sup>1</sup> Both in the French and in the Papal Court there was then a quantity of diplomatic business in progress regarding Scotland. We shall hear more of it hereafter; but it is necessary in dealing with it to leave out the name of Wallace, regretting that there is nothing to inform us distinctly whether the scraps of evidence alluded to are or are not connected with eminent diplomatic services performed by the popular hero.

Early in the year 1298, a *souffrance*, as it is called in Norman-French, had been negotiated between England and France. The word is translated as a truce, but it means something very different from a modern truce. It was a transaction between governments, while a truce is merely a transaction between armies—a promise to suspend hostilities for a time, and until some affair should be transacted, such as the burial of the dead during a siege, or the reception of instructions from headquarters. The *souffrance* was more of the nature of a peace at the present day; and the reason why of old it was treated as distinct from a peace was this: The wars of the time generally arose from questions of succession or of feudal superiority. When it became desirable to cease fighting, while yet neither side was prepared to give in to the other, there was an agreement to give up fighting in the mean time, reserving all rights entire for future discussion. A *souffrance* or truce of this kind might last for centuries.

There was thus a virtual peace between England and France, which specially included the allies of each. Philip complained that it was not faithfully kept, in as far as King Edward held in bondage a good ally of France, John, King of Scotland, along with several persons of rank and consideration, his subjects. There was a solemn conference about this matter, which appears to have been held at Edinburgh while Edward was retiring southward after his victory at Falkirk.<sup>2</sup> Edward maintained that the

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<sup>1</sup> Wallace Papers, 102.

<sup>2</sup> "Actum in castris seu tentoriis dicti regis Angliæ prope Castrum Puellarum in Scotia, quod vulgariter nuncupatur Edinbourg." The



French alliance had been renounced by the Scots and their king ; and if he could not establish this point in diplomatic law, he could show that he had spared no pains to accomplish it. The renunciation was conspicuous, not only in the submission of Baliol when he was finally carried away, but in the acts of homage which Edward exacted from people of all ranks in his great progress through Scotland after the capture of Berwick. Each of these was separately recorded and kept ; and if a bundle of such parchments could have accomplished what was wanted, the thing had been done.<sup>1</sup>

The King of France, however, thought that the annulling of treaties must lie with those who had contracted them. He had a treaty with the King of Scots ; and if that king, without making him a party, had engaged with another, it was because he was in the power of that other. On the other hand, the King of France did not admit that Edward had feudal claims authorising him to maintain that the King of Scots, being his vassal, could not be a party to a treaty. There were claims of superiority of all kinds bandied about among crowned heads at that time ; and where one king found another reigning over an established kingdom, the two were entitled to hold diplomatic relations. King Edward had to let the question hang over from the force of circumstances. We shall see that he was making preparations to crush Scotland by an irresistible army, but was so impeded by one difficulty after another, that he could not make an effectual beginning to the project. He received in the midst of his struggles a courteous communication from the new guardians of Scotland, setting forth that they intended to maintain the truce, and expressing a hope that he would do the same. Through the tedious diplomatic documents which were working on to a general peace, we still find France insisting on the truce ; and in the autumn of 1300 we find King Edward agreeing, at the solicitation of the King of France,

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date is 1298, and the 26th year of Edward I., which brings it after 20th November.—*Fœdera* (Record edition), i. 898.

<sup>1</sup> See the specimens printed in the Ragman Rolls.

There was a deputation attending to the interests of Scotland at the Court of France, including Bishop Lambert, the Steward of Scotland, and other eminent persons. They were no doubt somewhat disturbed when they saw this treaty; but they wrote to the guardians and community of Scotland to be of good cheer—King Philip's words were yet encouraging, and he taught them to expect that he might influence King Edward to offer terms to Scotland. But should King Edward's heart, they say, be hardened like Pharaoh's, they hope their countrymen will hold on manfully and unanimously, trusting in the God of battles, and resisting to the last; and they throw out a few words of comfort and encouragement in telling of the fame their countrymen had acquired far and wide over Europe by their achievements in the war with England.<sup>1</sup> There is more diplomacy for some time between Scotland and France: the alliance has not been cancelled, but France does not find it convenient to act on it.

There was another foreign influence at work on the destinies of Scotland. The view to be taken by the Court of Rome, about the struggle and the merits of either party, was of much moment. About the policy which the Popedom had pursued for some centuries in the quarrels of the European powers, there is a popular notion that it was merely a development of the propensity of powerful priests to meddle with matters out of the line of their spiritual duties. It fell to the Popes, however, to perform onerous duties in national diplomacy. The system of rights and obligations, called the law of nations, and latterly international law, had the anomalous quality of being a code, obligatory among the states of Europe, which yet there was no supreme head to enforce. It was a law punishing and protecting without any court to enforce its decrees. It had not been thus, however, in its origin. This law of

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attendance, unless upon the ground of sickness or storms at sea, or any other sufficient excuse, the ground of which is distinct and notorious; and if he have a personal excuse for absenting himself, his son must come in his place.

<sup>1</sup> *Fœdera* (Record edition), i. 955.

nations—the diplomatic code of Europe—was founded by the Empire, which had power to give it force ; and it has existed down to the present day as a tradition sanctioned by immemorial usage, and the deference of public opinion throughout the civilised world. When the secular side of the Empire was broken up, there remained yet the ecclesiastical side, with a powerful and intelligent official staff, penetrating into the farthest provinces of every country in Europe. A great deal of the work of the Empire at large fell to this department. It was the most natural of all alternatives—one official organisation being broken up, here was another so close as to be almost identical with it; not only complete, but in the best working order. Thus many departments of secular business fell to the Church—among others, in several countries, the organisation of those municipalities which were so valuable a member of the old Imperial system. As we have already seen, the Church supplied an organisation for keeping up the old civil law throughout Europe—an operation less remarkable in those countries where it quietly prevailed than in England, where the common law gave it continual battle.

In the same way the organisation at the Papal Court kept up the old *comitas gentium*—the diplomatic relations which held Europe together. The system was not so much a creation of aggrandising, ambitious churchmen, as the result of a pressure from those forcing business into the holy court. This was a vast establishment thronged by greedy, ambitious suitors of all nations and languages ; and thus sought and courted, it could not fail to be powerful. Perfect justice was no more to be found there than elsewhere among human institutions. Influences were at work commensurate with the greatness of the stakes at issue. It would often depend on something other than its goodness that a cause was successful.

The cause of Scotland must have been well supported at the Court of Rome, for a decided impression was made. Something was probably due to a pretty loud participation in the national wailings, by a body who knew how to be heard at Rome, and whose voice would find ready sympathy there. The Church of Scotland was in danger

—or rather the churchmen. King Edward thought it would be in favour of loyalty to the house of Plantagenet if the ecclesiastics serving in Scotland were Englishmen. The view was no doubt a sagacious one, provided it could be got into practical operation. The steps towards it, however, gave alarm. In the winter of 1297 he had sent instructions to Brian Fitz Allan, whom he had appointed governor, that on the occurrence of any ecclesiastical vacancy of no higher value than forty merks annually, he should present to it some member of the Church of England; or if that did not suit, any other discreet person, provided he were an Englishman.<sup>1</sup> It is to be inferred that to more valuable charges the king would himself present. Lamberton, who had to fight for his bishopric, and would be driven from it if the English rule were resumed, had been consecrated by the Pope. He had gone to France, and may have gone to Rome, in the national cause; and his reception there as a prelate would make the adoption of his cause a matter of consistency. There is so far a probability of Wallace also having been there, that, as we have seen, he obtained credentials to the Court of Rome; and it does not weaken this supposition that King Edward, in his memorial to the Pope, declared his Holiness to be under the influence of certain "enemies of peace and sons of rebellion" residing at Rome. According to the later chronicles, the authorised emissaries of Scotland were Baldred Bisset, William Eglesham, and William, Archdeacon of Lothian. Whoever were the working men, they achieved the first great point in all such contests—they made those who had the duty of getting up the details of business at the Court of Rome thoroughly acquainted with the whole case for Scotland against the English claims.<sup>2</sup>

In the summer of 1298 there came to Edward from Rome a preliminary hint—a paternal admonition concern-

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<sup>1</sup> *Fœdera* (Record edition), i. 877.

<sup>2</sup> In the *Scotichronicon* the instructions to the representatives are given in full; but if this version of them is correct, it is clear that the representatives, who took a different course, were much better men of business than their instructors at home.

ing charges against him of unjust aggression on Scotland—a document adorned by precepts, pointing towards justice and peace and loving-kindness among Christians. This was followed by another more to the point. It charged King Edward distinctly with a violation of the rights and liberties of the kingdom and Church of Scotland, done under the false pretence of a right of superiority over that kingdom. It told him that he had no excuse, because there were palpable events of recent times incompatible with any such right of superiority. With great distinctness these events were set forth: how when Henry, the father of Edward, got assistance from his son-in-law, the King of Scots, careful stipulations were made that the assistance was given of favour and friendly alliance, not of obligation; and when Alexander did homage to Edward himself for Tyndale and Penrith, care was taken to mark the limitation of the homage. King Edward's failure to take the guardianship of the infant queen on the death of King Alexander—his duty if he really were superior of his realm—was strongly put; and the details of each precedent were given in the Papal bull with a clearness and precision which could not have been excelled by any draftsman in Edinburgh.

There was a feature in this document which has created some excitement among historians. The Pope declared that the kingdom of Scotland belonged, and had of old belonged, to the Church of Rome. This has been dealt with as an impudent attempt on the part of the Pope to drive the plunderer from the prey, in order that himself might take it. But there was no intention to imitate King Edward by annexing Scotland, either as a feudal dependency or an absolute dominion, to the Court of Rome; such a project was not within the bounds of the practicable. The meaning of the claim was, that Scotland was a free sovereignty, with no subjection save such as all sovereigns owed to the Church of Rome—a subjection which that Church was of course apt to interpret more widely than her subject sovereigns would admit. Finally, the Pope told King Edward, that if he believed himself to have any rights over the kingdom of Scotland, he was free

to prove them at the Holy Court, lodging there all the laws, writings, and other things on which he founded, and his claims would have full consideration as those of a valued son of the Church. This was precisely in accordance with that supervision of the diplomatic relations of the European powers which had fallen to the Church, or rather the Court of the Church, at Rome. A great country desirous of crushing a small one gets up a case in its own favour, and acts on it. But before the old established landmarks of the European powers are thus broken up, the Court of Rome chooses to examine the case, and to give a judgment, to be carried into effect by interdict or other ecclesiastical process. It may not have been a sound political system, but it put a stop to a world of oppression, and prevented the peace of Europe from being so often disturbed as it would have been by rapacious despots, gratifying to the utmost their lust of power.

The Pope sent his bull to Robert Winchelsea, Archbishop of Canterbury, with instructions to deliver it into the king's own hand. Never was prelate more hardly beset. There was all the unpleasantness of conveying an unpleasant message to a man not blessed with a placid and forgiving temper, and there were the difficulties of the journey—for King Edward was away at the northern extremities of his kingdom menacing Scotland. The archbishop recounted all his difficulties and dangers to his master, and we thus get a glimpse of some of the physical and social conditions caused by the war. After having consumed several days in preparation for his formidable journey, he set off, apparently in the summer of 1300, and reached Carlisle in twenty days. There, to his dismay, he found that the king had gone with his army into Galloway. He met with some discreet laymen, and with clerical persons worthy of all confidence, from whom he found that the country swarmed with armed Scots; and even supposing him to get through with safety, there was no food in it for his retinue. No one, not even among the clergy, was zealous enough to carry a message intimating his arrival, or even endeavour to procure a safe-con-

duct for him. He fell at last on a shrewd device. Remaining at Carlisle, he sent two of his retinue by sea, who reached the army of Edward with much risk of capture, and with like risk brought answer to his question how he could with safety endeavour to get an audience. The answer sent him was, that the king could suggest no better way than this : the queen and he were on some future day to have a meeting, and the bishop might join escorts with her.

The prospect of this arrangement, however, was indefinite, and the inducements to wait on were extremely meagre ; for he mentions that, during nearly six weeks, while his messengers were absent, having to be so near the border of Scotland, he was glad to obtain sufficiency without aspiring at abundance of food. He heard at last that the king had come back to the Castle of Caerlaverock, which had some time ago been taken. He then managed to get himself and his equipage conveyed across the Solway at low tide, encountering more peril than he seems to have known of. And so the triumphant conclusion of his adventures was, that he unexpectedly came upon the king at dinner on the Friday after the Feast of St Bartholomew the Apostle, or towards the end of August.

He was called next day to a solemn audience, where the king was surrounded by the crowd of nobles and knights who, as we shall see, had attended him to the siege of Caerlaverock. The messenger read his instructions, and then reverently handed the admonitory bull of his Holiness to his Majesty. What we would expect in ordinary court usage is, that such a document should be passed on to a secretary to be kept for private perusal ; the king, however, directed the document to be publicly read, and then gave instructions for translating it into French. The messenger was then told that this affair of Scotland was one of those in which it was necessary for the king to consult the chief persons, ecclesiastical and temporal, of his kingdom ; that although several of these were present, many were absent ; and when there had been due and full deliberation, then would the king send by a messenger of his own an answer to his Holiness.

The first step taken was to let loose upon the Court of Rome the wrath of the English temporal barons. Nothing better served to rouse them into union and patriotic action than resistance to the encroachments of the Church, and they sent to Rome a memorable protest against this attempt to interfere with the feudal and constitutional prerogatives of the crown of England. King Edward was in the mean time anxious to prepare and set forth a convincing case in favour of his claims. He had already, as we have seen, obtained materials from the religious houses, but he wanted more, and their records were again ransacked. Rishanger, whose notes of what was passing are so valuable, was employed with other cunning scribes to bring the case to perfection. The result was a production, one of the most extraordinary, as a state paper, to be found on record, though people may be familiar with the greater part of its contents in other shapes.

After setting forth that the right of superiority in the King of England over Scotland was undoubted and notorious to all the world, and had been in active exercise by the removal and appointment of the rulers of that country at will—for the satisfaction of his Holiness, a brief narrative is put together to show the origin and antiquity of the right. It commences thus:—

In the time of the prophets Eli and Samuel there was a certain illustrious personage named Brutus. He had to abandon Troy after the destruction of that city; and taking with him a following of noble Trojans, the band discovered a certain island, then called Albion, inhabited by giants. These were all defeated and slain by the Trojans, who, in honour of their chief, called the island Bruton or Britain, and they built the town of Trinovantum, now called London. Brutus had three sons, on whom he settled his possessions. To the first-born, Locrin, he gave that part of Britain called England; to the second, Albanac, he gave Albany or Scotland; and to the third, Camber, he gave Cambria or Wales. The important point to be kept in view at this stage is, that it was the invariable practice of succession in Troy that the eldest and his line should rule over the younger brothers and their de-



scendants. There were invasions of the new territory and other causes of disturbance, the particulars of which are set forth with a minuteness that seems to challenge criticism; but the result is, that as Locrinus was supreme over his brothers at the beginning, so did his descendants continue to be supreme over all other rulers in Albion. We come at last down to an epoch illustrious throughout the world by the deeds of the great King Arthur, who, indignant at the turbulence of the Scots, signally punished them, displaced their king, and appointed his follower Anselm to rule over them; and this Anselm did due feudal homage for Scotland to his lord superior, King Arthur, at a renowned festival held at Caerleon.

It is impossible to estimate the weight attributed to the next precedent, without remembering that King Edward was deeper even than his age in reverence for the later saints and their miracles. King Athelstane of England, it was said, had under the auspices of St John of Beverley subdued a rebellion in Scotland. Having finished his work, he prayed, through the intervention of the same St John, that it might be granted to him to receive a visible and tangible token, by which all future ages might be assured that the Scots were rightfully subject to the King of England. His prayer was granted in this way: Standing in front of one of the rocks at Dunbar, he made a cut at it with his sword, and left a score which proved to be the precise length of an ell, and was adopted as the regulation test of that measure of length. This miracle was attested by a weekly service in the church of St John of Beverley. He was perhaps the most powerful miracle-worker of all the English saints, and his triumphs in this line are amply commemorated by Bede. King Edward and some of his advisers would devoutly believe that this story of the miraculously-created ellwand standard would do more for his cause than his long array of historical precedents; but it may be questioned if the acute scribes working at the Vatican conceded so much influence to it, for they were apt to be perplexed and overburdened by such miraculous solutions of temporal difficulties.

King Edward's pleading goes on after this rather pro-

中國經濟發展與社會改革之研究，其目的在於探討中國經濟之現狀，並尋求改進之途徑。本文將從經濟之現狀、問題之分析、以及改進之途徑三方面進行論述。首先，就經濟之現狀而言，中國目前正處於一個經濟發展之關鍵時期。由於戰爭之影響，中國之經濟基礎已受到嚴重之破壞，生產力大為下降，物價飛漲，民生凋敝。其次，就問題之分析而言，中國經濟之主要問題在於生產力之低下，以及分配之不均。生產力之低下，是由於技術之落後，以及設備之缺乏所致。分配之不均，則是由於土地之集中，以及資本之壟斷所致。最後，就改進之途徑而言，中國應採取以下之措施：第一，發展生產力，提高技術水平，增加設備投入。第二，改革分配制度，實行土地改革，打擊壟斷。第三，加強社會福利，改善民生，穩定物價。

以上所述，為中國經濟發展與社會改革之主要問題及改進之途徑。希望政府能採納以上建議，以促進中國經濟之發展，並實現社會之公平與正義。此外，本文亦將探討中國經濟之未來發展趨勢，以及社會改革之重要性。中國經濟之未來發展，將取決於政府之政策，以及國民之努力。社會改革之重要性，則在於它能為經濟發展提供一個穩定之環境，並提高國民之生活水平。總之，中國經濟之發展與社會改革，是一個不可分割之整體。只有兩者並重，中國才能實現真正之繁榮與昌盛。

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none of the others were left behind. In his banner were three leopards courant of fine gold set in red, fierce, haughty, and cruel—thus placed to signify that, like them, the king is dreadful, fierce, and proud to his enemies; for his bite is slight to none who inflame his anger—not but his kindness is soon rekindled towards such as seek his friendship or submit to his power.” “An auxiliary force was commanded by Anthony Beck, Bishop of Durham, ever at hand when there was fighting.” He is described as “the most vigilant clerk in the kingdom—a true mirror of Christianity.”

The historian admired the strength and beauty of the castle, with its walls and ditches, and saw it was not to be taken like a chess rook. He describes the cutting down of trees and brushwood, and the building of huts to lodge the besiegers, and the arrival of vessels in the Solway Firth with the besieging engines. The foot-men were sent forward to begin the siege. “Then might be seen stones, arrows, and quarreus to fly among them; but so effectually did those within exchange their tokens with those without, that in one short hour there were many persons wounded and maimed, and I know not how many killed.” The rest became excited, and a general attack was made; the heaviest engines were worked in throwing stones, and when there was a good hit a great shout arose among the host. This seems to have gone on for a day or two, until three other engines were brought, “very large, of great power, and very destructive, which cut down and cleave whatever they strike—fortified town, citadel, nor barrier, nothing is protected from their strokes.” The Knight of *Kirkbride* excited the admiration of the historian: “Many a heavy crushing stone did he of *Kirkbride* receive, but he placed before him a white shield with a green cross engrailed. So stoutly was the gate of the castle assailed by him, that never did smith with his hammer strike his iron as he and his did there. Notwithstanding, there was showered upon them such huge stones, quarrels, and arrows, that with wounds and bruises they were so hurt and exhausted that it was with great difficulty they were able to retire.”



seem to have been expected. One day, as the English chroniclers tell us, a boy ran into the camp, telling, that from the top of one of the high banks abundant round Roslin, an army might be seen close upon them. It had come from the uplands of Peebles and Lanark, and fell on Segrave by surprise. He was wounded, and made prisoner along with twenty knights. Another of the divisions came up and released the captives, but seems rather to have suffered than to have inflicted punishment. The services of the third division, indeed, show that the others were in flight. This division had been hearing mass, undisturbed by the double battle, and after it was over were enabled to check the retreat of the other two divisions and punish their pursuers. Ralph the Coffeier was among the slain.

Any account we have of this affair is meagre and indistinct. We must depend on the English chroniclers; and all we can distinctly carry from them is, that their king's army was surprised, and had the worst part in the conflict.<sup>1</sup>

Into some old accounts of the battle of Roslin it has found its way that Wallace was present and commanded the Scots force. It may have been so, but it is not sufficiently vouched to be admitted as a historical fact. The Scots chroniclers, Wyntoun and Bower, exalt this affair into a great battle and an eminent victory gained by the Scots; but as they accompany it with acts of extreme cruelty, their narrative of triumph may be abandoned without any sacrifice of the national honour.

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<sup>1</sup> Hemingford, i. 199.

free of the conqueror's path. They formed a project for helping the defence of Stirling Castle by guarding the Forth, after the example of Wallace. King Edward, however, flanked them by crossing the river, whether at the Frew or some nearer ford, and the Scots troops dispersed, leaving Stirling Castle to defend itself. A sad interest surrounded this, the last spot of ground in all Scotland that did not belong to the invader. The castle stood a long and memorable siege. The obstinacy of the defence is echoed by the English chroniclers in their vauntings of the valour, skill, and engineering resources of the besiegers, and their exultation at the final capture. From their accounts of the siege we may infer that part at least of the castle works were on the new system of fortification. All novelties in the art of defence have their parallel in new systems of attack. When we hear of the throwing up of zigzag earthworks by engineers working in ditches, we know that these are approaches to the low bastioned fortresses of the Vauban school; and so when we find tall wooden towers erected, with machinery in them for casting missiles horizontally, we know that the tall buildings of the Norman school of fortification are to be attacked. Against these, with their thick walls of fine masonry, the old battering-ram of the Romans, made to drive a hole in a thin wall, was as harmless as a child's toy. The besieger had to meet his enemy aloft, parallel with the windows of his towers or with the roof, and only lofty piles with great projectile power could accomplish this. We are told that the stones or lumps of lead cast against the wall bounded back, leaving no mark, but those sent from above broke through roof and vault, and did vast mischief. Besides the strength of masonry, which was the sole difficulty at Caerlaverock, there was another in Stirling of a very formidable nature in the fortress standing on the edge of a steep rock. The engines brought up were marvels in their day for ingenuity of device and weight of metal. There was one that the chroniclers say could hurl stones of from two to three hundredweight.

King Edward was now sixty-five years old, yet his impetuous and determined spirit drove him to perpetual

against this desperate and unceasing work for more than three months. Yet the immediate presence of starvation, rather than the success of the assailants, seems to have driven them to ask for stipulated terms. The request was refused; they must surrender at discretion. When the garrison came forth they were only 140 men. Some twenty-four of superior rank appeared before the conqueror half naked, with ropes round their necks, and performed the humiliating ceremony exacted at that time from conquered garrisons.

With true Norman pedantry, a notary public of the holy Roman Empire docketed the act of submission as having taken place before himself and certain famous witnesses on the 24th of July, and on the eve of the Feast of St James the Apostle, in a valley, through which passed a road leading to a gate in the Castle of Stirling, within the kingdom of Scotland and diocese of St Andrews.<sup>1</sup>

A touch of generous sympathy with the courage and dutiful endurance of these men seems to have reached the heart of the victor, and instead of ordering them for death, as all seem to have expected, he dispersed them in English prisons. King Edward felt so much beholden to those barons who had borne the brunt of the siege that he made a roll of merit, containing the names of Warenne, Lincoln, Gloucester, and others, all of whom were invited to make application to him for some special gift, or other reward for their services.<sup>2</sup>

But in truth his leniency to this garrison was one of the examples of a new policy towards Scotland which experience had taught him. Strengthening his hand to the utmost, he would yet lay it on gently, if not winningly. He was no Nero or Domitian, luxuriating in the mere lust of power, and besotting himself in bloody orgies. His ambition was to be an organiser and reformer—in his own way a benefactor to his race—and this passion was the

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<sup>1</sup> *Fœdera* (Record edition), i. 965. The chief accounts of the siege are to be found in Hemingford, Matthew of Westminster, and Langtoft.

<sup>2</sup> Palgrave's *Illustrations*, cxxviii. 275.

The capture of Wallace was now the chief immediate object of King Edward. Presently after the siege of Stirling, we find him exhorting those who had just experienced his clemency to aid him in this good work, and promising that it would be profitable to him who should be successful, either in the shortening of his exile, or in some other shape.<sup>1</sup> Wallace was found in Glasgow. The chief person concerned in his capture—the leader, as it would appear, of the party told off for that duty—was Alexander de Monteith. Of certain rewards given to the captors, he had the largest share. As his name was afterwards a common one in Scotland, it became part of the romance of Wallace's career that he was betrayed by a fellow-countryman and an old companion in arms; but Monteith was in the service of Edward: he held the responsible post of Governor of Dumbarton Castle, and it seems likely that he only performed a duty—whether an agreeable one or not.<sup>2</sup> The captive was taken southwards, and on the 22d of August carried through London, at-

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le Waleys by force of arms—he, the said Michael, not consenting to such seizure. He had made his escape, and, in fact, got some two leagues off, when certain armed men, accomplices of the said Waleys, brought him back to their leader, who threatened to kill him if he attempted again to escape. He did in fact, however, again run away, and got three leagues off and more, when he was again caught, suffering great violence and injury from his captors; and on this occasion he verily believes that Waleys would have slain him, but for the *intervention of some of his accomplices*: so was Michael de Miggel prevented from attending according to his duty. The time at which he was thus seized is no otherwise indicated than by *dudum*, which may be translated “lately.” The question is, whether the *dudum* can be stretched more than seven years to reach the time when Wallace was in power, or must be held to refer to incidents a few weeks or months before the date of the inquest, which was held just a few days after Wallace's execution.—*Calendarium Genealogicum*, 703.

<sup>1</sup> Palgrave's *Illustrations*, cxxix., 276.

<sup>2</sup> In the curious scraps preserved by Sir Francis Palgrave, there is a jotting, probably from some Treasury memoranda or scrolls, of forty merks to the valet who spied out Wallace, and sixty merks to be divided among the other captors. Then follows: “De la terre, c'est a savoir C livres pour Johan de Meneteth,” p. cliv and 295.

Langtoft says the actual securing of Wallace was effected through treason of John Short, his man. This may or may not be the name



Those who were thus received to mercy, even to favour, had thoroughly committed themselves in arms—in rebellion, as it was counted—against the king. We must go further, therefore, than any question about the mere extent of personal criminality attributed to each. The men belonging to the class of Norman barons had yielded to temptation and gone over to the popular cause in Scotland, instead of holding by their legitimate lord. But in feudal notions there was some palliation for what they did. They had lost the protection to which they were entitled in return for the fealty. The popular party had virtually taken Scotland from the hands of Edward, and their interests lay with the power that could command their estates. Now the power of Edward was effectually restored, and they might be counted on to return to their natural position. Wallace, on the other hand, was the one great representative of the popular nationality, the real difficulty with which King Edward felt that he had to deal in Scotland. He was going to deal with it moderately and leniently, but he would show, in the first place, a terrible warning to those who might obstinately stand in the way of his projects.

Whether Wallace had been absent in France or Italy soon after the battle of Falkirk, he was in Scotland during these proceedings. There are faint traces of his keeping to inaccessible districts, with an armed following, and it is quite natural that some of his old followers should gather round him.<sup>1</sup>

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<sup>1</sup> There is a very tantalising reference to his motions in a collection of miscellaneous fragments from the Public Records of England, printed in 1865. It is called "*Calendarium Genealogicum*," and consists of such notices of persons and families, with their possessions, as are found in the proceedings of inquests on succession of heirs, boundaries of estates, and the like. Among these comes up, on Wednesday after the commemoration of the beheading of John the Baptist, in the 33d year of Edward I.—that is to say, in the beginning of September 1305—an inquest held at Perth by Malice, Earl of Strathearn, custodian of the northern districts in Scotland. This inquest appears to have been transmitted to some tribunal in England as the excuse of a certain Michael de Miggel, whose attendance was due, but not given. It was sworn to on oath that he had been seized by William

tended, like Caractacus in Rome, by a great crowd of citizens. He was secured in a house belonging to a citizen of London, William de Leyre—in Farringdon as it would seem.

A special commission was issued to five persons, three of them to be a quorum, to act as justiciars in the king's charge against William Wallace. They were John de Segrave, Peter Maluree, John de Bacuelle, Ralph de Sandwyc, and John le Blound, Lord Mayor of London. He was put on trial in Westminster Hall, on a bench at the east end, as the chronicles say. They give, too, a story difficult to account for, how there was a wreath or coronet of laurels placed round his head on the occasion. The reason given for this is, that he had boasted in his triumphs, that he would wear a crown in London—and so his boast was fulfilled. Anything more unlike the character shown in Wallace's career cannot easily be conceived. Yet, on the other hand, it is not consistent with the practical and grave character of King Edward that he should have played this fantastic trick without a sufficient reason.

It brings us closer to the point to look at the few traces we have of the accusation and judgment. A deep policy runs through the form adopted. The captive was not to be treated as a prisoner of war at the disposal of the executive; he was to be regularly tried on indictment as a subject of the King of England who had committed certain offences. He was not, however, permitted to plead

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of the "vallet qui espia William de Wallaise" in the Palgrave Fragments.

This story of Langtoft's is the earliest in which the seizure of Wallace is attributed to treachery. With the chronicler, however, the event points a moral, in showing how it is the fate of murderers, thieves, traitors, and other criminals to be betrayed by their accomplices in crime:—

"A Jhesu whan thou wille hou rightuis is thi mede,  
That of the wrong has gilt, the endyng may thei drede.  
William Waleis is nomen, that maister was of theves,  
Tithing to the kyng his coven, that robber mischeves;  
Sir John of Mentest served William so nehi,  
He tok him when he wend lest, on nycht his leman li—  
That was thought treson of Jack Short his man,  
He was the enchesen, that Sir John so him nam."

—Langtoft's Chronicle, 329.

aid of the executive government. In the selection of that council the king showed his reliance on the co-operation of the great churchmen and barons in his new plan. The council selected by him all bore titles thoroughly Scotch, and among them were some of those who had but just laid down their arms and accepted of his clemency.<sup>1</sup>

In an English parliament which assembled early in the year 1305, the king called for the advice of the Bishop of Glasgow, the Earl of Carrick, and John de Mowbray, on arrangements for having Scotland represented in a parliament to be afterwards called. These advisers reported on some matters of detail and practicability; it would not, for instance, be practicable to have meetings for election before next Ascension-day, nor could those chosen be well in attendance at London until after the Feast of the Nativity of St John the Baptist, or midsummer. The amount of representation to be conceded to Scotland was then settled, and, if we are to believe the record, was an echo of the report presented by the three advisers. There were to be in all ten representatives: there were to be two selected by the prelates, two by the abbots, two by the earls, two by the barons, and two by the community or commonalty—one for the district north, the other for the district south, of the Forth. The advisers recommended that these representatives should be refunded their personal expenses for attendance in England; and it was directed that these should be paid by the lieutenant and treasurer of Scotland out of the funds at their disposal. Writs were then issued for the attendance of the electoral colleges, as they would be called on the Continent, at Perth, to appoint representatives to attend the king's parliament in London within three weeks after St John's Day.<sup>2</sup>

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1 "The council were—the Bishops of St Andrews, Dunkeld, Aberdeen, and Ross; the Abbots of Melrose, Cupar, Jedburgh, and Dunfermline; Bruce, Earl of Carrick; the Earls of March, Buchan, Athole, and Ross; Sir John Comyn, Sir John de Mowbray, Sir Alexander de Argyle, Sir John Monteith, Sir Duncan de Fren-draught, and Sir John de Inchmartin."—Palgrave's Documents, clii., 292.

<sup>2</sup> Ryley's Pleadings, 241, 279.

There was also to be a symbolical application of the parts of the body unburnt. They were to be distributed over England and Scotland, in token that his crimes had been committed not solely against our lord the king, but against the whole population both of England and Scotland: wherefore his head was to be placed on London Bridge; one quarter was to be suspended on a gibbet in Newcastle-on-Tyne, another was to be exposed at Berwick, a third at Stirling, and the fourth at Perth. The sentence was executed on the 23d of August, and it is one of the kind about which ordinary people generally entertain a hope that the humble ministers of justice who give effect to it lag behind the cruel spirit of the law, if they do not even take occasion to soften the letter of it.

The death of Wallace stands forth among the violent ends which have had a memorable place in history. Proverbially such acts belong to a policy that outwits itself. But the retribution has seldom come so quickly, and so utterly in defiance of all human preparation and calculation, as here. Of the bloody trophies sent to frighten a broken people into abject subjection, the bones had not yet been bared, ere they became tokens to deepen the wrath and strengthen the courage of a people arising to try the strength of the bands by which they were bound, and, if possible, break them once and for ever.<sup>1</sup>

King Edward was already busily carrying out his new policy. It was much of the nature of a partly federal, partly incorporating union. There was to be one king over the whole island, and one great council or parliament. The crown was to be represented in Scotland by a governor or lieutenant. He was to be assisted by a council—not of the nature of a parliament with a deliberative voice, but a small body selected by the crown to give advice in

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<sup>1</sup> It is singular that among the many records of the period so carefully preserved there is none of the process against Wallace. The above account has been taken from an unauthenticated manuscript, bearing to be a copy of the principal parts of the record of proceedings, which has been preserved, and is printed in the Wallace Papers, p. 189. It bears marks of authenticity, which are strengthened by a comparison of its contents with the shorter accounts in the chronicles.

code of laws of the Brets and Scots is to be cancelled; as unsuited to the civilisation of the period.<sup>1</sup> When the lieutenant or governor returns to Scotland he is to take counsel of the good men of the country, and to prepare and submit to the king a report on the laws sanctioned by King David, and any additions made to them in later times. Such things as are found contrary to the law of God and to sound reason are to be rejected. The lieutenant and his advisers may find some on which they cannot come to, or will not venture on, a conclusion on account of their importance. These they are to report to the king as matters undecided, along with their report on those parts of the laws and customs of Scotland which they recommend for adoption in permanence. The ordinance, after these general provisions as to the laws which are to be in force in Scotland, puts some restraints on dangerous persons, and gives a general power and recommendation to the lieutenant, with the counsel of the good men of the land, to send troublesome persons into England, where they will have to abide southward of the Trent.

*The ordinance is not a logical or methodical document. It mixes up the broadest projects of legislation and administration with mere personal interests and arrangements. But it bears the impression of a high intelligence and a far foresight, mellowed by beneficence and even kindness. The author of it sees that, once brought together, without violence or goadings to national antipathy, the two nations would naturally co-operate and fuse into one compact empire; and no one could be more alive to the mighty destinies that such an empire might have to look to. Had he begun in this spirit, there are many things to render it credible that he might have been successful. A nationality distinct from and antagonistic to that of the English people had not been made before the death of Alexander III. The Scots looked to King Edward with a paternal feeling, and had a leaning to the English institutions. Of these they were never afraid;*

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<sup>1</sup> See chap. xvi.

Before following the adventurer on his career, let us look at the position in which recent events had placed him. We have seen the figure made by his grandfather, fifteen years earlier, as a competitor for the crown before the court established by King Edward as lord superior. The grandson was born in 1274, and so would be a young man some seventeen years old when his grandfather was pleading before King Edward for the kingdom of Scotland, or for a part of it if he could not get the whole. The intermediate Bruce, the son of the competitor, was a quiet unambitious man. He went to the wars in Palestine—but in that he was only conforming himself to the usage of the day; and when he returned he lived peaceably in the enjoyment of his wealth and honours. He was known, indeed, for nothing else so remarkable as his romantic marriage to the mother of the hero.<sup>1</sup> He was but for a short time head of the house. His father died

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<sup>1</sup> The following is a fair rendering of the accounts which the chroniclers give of this incident:—

"As the Scots had declared their readiness to sustain their part in the crusade, it was incumbent upon them to fulfil their promises, and accordingly several of their principal nobles, assuming the cross, departed with their followers for Palestine. Amongst the number of crusaders who never lived to return was Adam de Kilconceath, Earl of Carrick in right of his wife, Marjory, the heiress of the late Earl Nigel. About two years after the death of Earl Adam, his youthful widow was engaged in a hunting excursion, with a gay and gallant company of ladies and esquires in attendance, when a handsome cavalier of noble and distinguished appearance cantered across her path. The countess saluted the knight, and as the courtly manners of the day required, he returned the lady's greeting according to the agreeable custom of the age, but excused himself from joining in the chase, until Marjory, unaccustomed to refusal, laying her hand upon the bridle, turned his horse's head with gentle force, and galloped off with her captive to Turnberry Castle. The countess had secured her prize; and after a fortnight's imprisonment in the lady's bower, the young heir of Annandale and Cleveland capitulated, and became the husband of his adventurous captor. Alexander was furious at such a breach of feudal decorum, threatening, as a punishment, to confiscate the earldom; but he suffered himself to be appeased by the entreaties of their mutual friends, and contented himself with levying a considerable fine upon the enamoured delinquents. The eldest son of this singular and romantic love-match was the illustrious Robert Bruce."—Robertson's *Early Kings*, ii. 109, 110.

and if they could have felt assured of retaining such freedom of action as these or their own native institutions gave, they would not have been apprehensive of innovation. What they dreaded was the prerogative power, royal and baronial, which the Normans brought by innovation on the original laws and customs of England. In the discussion of the succession, and in the military occupation of the country, these were set, in their most offensive shape, face to face with the people of Scotland. Throughout the twelve years' contest, too, they were reminded over and over again of those innovations, with which their neighbours were still at war. They knew that when the King of England found difficulty in gathering a sufficient force for crushing them, it was because he was haggling with his own people about demands for the renewal of the Great Charter and the limitation of the Forest Laws; and these reiterated demands were nothing but the lamentation and denunciations of the people of England for the rights and liberties of which they deemed they had been robbed.

For twelve years Scot and Englishman had drawn each other's blood; it was long enough of such work to make a national hostility. Conciliation came too late. It may be questioned if Edward knew this. He was preparing for a great union parliament at Carlisle, where more still was to be done for the fusion of the two nations. The administration of business in Scotland seems to have been going on quietly and regularly. The king, now nearing seventy years of age, might have reason to expect a peaceful evening to his stormy life, gladdened with the reflection that, if his treatment of Scotland had at first been marked by a necessary hardness, he had moulded his acquisition for the attainment of a goodly future by acts of mercy and justice. Whatever were the dreams of the conqueror and pacificator, he was suddenly awakened from them. One day in the beginning of February 1306, Robert Bruce, Lord of Annandale, was missed at court, and it was found that he was off for Scotland. It was clear that a new act in the drama of the Scots conquest had opened.

of his house, that his grandfather had been nominated heir to the crown by King Alexander and his parliament; and the pleas on which that grandfather pleaded his right of succession were as strong as ever. The other competing families had all dropped out of the contest save the Comyns, but they were formidable rivals. Comyn the competitor, as we have seen, had a claim which could only stand after Baliol's, since they were descended of two sisters, and Comyn of the younger. Baliol was now out of the field, not merely by the feudal proceedings taken against him by King Edward, but by a voluntary resignation of his right of inheritance. Supposing this to be effectual, and no one gainsaid it, it removed the line of succession to which that of the Comyns was subsidiary. But further, Comyn the competitor married a sister of Baliol, and their son, called the Red Comyn, had thus an additional claim to represent the rights of the deposed king.<sup>1</sup> Then there was a mysterious tradition of his descent from Donald Bane of the old royal line; and though this went for nothing before the court of the lord superior, it might avail with a people eager to be led against their enemy and craving for a leader. Here then, altogether, Bruce had a formidable rival.<sup>2</sup>

Comyn's demonstrations for the national cause had been much stronger than Bruce's. He was with the host that swept the northern counties of England, and he afterwards acted as guardian or governor of Scotland, and

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<sup>1</sup> A chronicler who was born about this time says: "*Johan de Baillof avoit iii sores, la primer, Margaret la dame de Gillisland, la second fust dame de Counsy, la tierce avoit Johan Comyn a marry, pier cely qi Robert Bruis tua a Donfres.*"—*Scalacronica*, 121.

<sup>2</sup> There were several wealthy and powerful families of the name of Comyn in Scotland, but John, Lord of Badenoch, was the historical Comyn, from his connection with royalty. It may be well to keep him distinct from another very powerful lord of the name, John, Earl of Buchan, the Constable of Scotland, who seems to have been a steady follower of King Edward. Supposing that in the reign of Alexander III. the several families of the name of Comyn had acted together in a group, it would appear that, changes in the lapse of time separating them from each other, their descendants each followed his own policy.



pressed. Subsequent events show that Lamberton represented the feeling of the churchmen, who had their own ecclesiastical independence to protect, and had already felt that the King of England would fain displace them for English subjects on whose conformity and co-operation he could rely. Then the allegiance of the Church to Bruce meant a great deal more than spiritual or ecclesiastical support, important as that might be. The religious houses held large baronies, and could call out a great proportion, probably not much less than a third, of the fighting men of the country. It would be serious, then, for both parties, if rumours of such an alliance should reach King Edward's ears. In fact it became known that he had taken Bruce in a very menacing manner to task about some document to which he had become a party. There can be little doubt that it was the bond, for we know that Edward had the original of it in his hand, and it is on record that the other party, the bishop, was closely questioned about it.<sup>1</sup> It is said that Edward, having on the same day made rather free with the wine-flask, dropped words which showed that Bruce was in imminent danger of his life. A friend at court, the Earl of Gloucester, as it was said, sent him a symbolical warning—a sum of money and a pair of spurs. Bruce took the hint, and resolved to be off by morning. He took two followers with him. There was snow on the ground, and to baffle any attempt to track him out of London, he had the horses shod in the reverse of the usual manner, so that the marks might seem those of horses on their way to town. Some of these particulars are traditional, and so is the story that the three met and slew a messenger whom they found on his way to court with dangerous papers from Comyn. Bruce halted at Dumfries. He must have known that he would find Comyn there—in fact the English judges were sitting in assize in the town; and the presence of two barons who had lands in the neighbourhood would create no surprise, but might be set down as a demonstration of

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<sup>1</sup> Sir Francis Palgrave gives the bond and the cross-questioning of the bishop as certified in a notarial instrument.—Documents, 323.

presented a hostile front to Edward on his invasion. We have seen that for all this there was but a nominal infliction laid on him, and he was received to favour. He was of the Norman school, not likely to feel any national antipathy to the supremacy of Edward, and it may be that his master could ill afford to quarrel with one who could be so effective a rival to the unsatisfactory Bruce.

We have seen that Lamberton, Bishop of St Andrews, was a zealous partaker with Wallace in his struggle for the purely national party. Whether it was by the bishop's advice or not, Bruce met him at the Abbey of Cambuskenneth, the scene of Wallace's great victory, in June 1304, and there the two entered into a league with each other, which was put in writing and sealed and authenticated by all the solemnities of the period; it is the earliest existing specimen of a kind of document which we shall frequently meet with afterwards. There are no engagements as to any distinct course of action, but the two bind themselves to general co-operation. Having discussed possible future perils, they resolve to aid and comfort each other when these come to pass. They are to stand by each other against all enemies; if either hears of any danger to the other, immediate warning is to be sent and co-operation given in averting it; most material clause perhaps of all—neither is to undertake any serious affair without taking counsel with the other. They bind themselves to this obligation by solemn oath. At the same time, as in any such modern contract for the supply of certain goods as a court of law would give effect to, either party failing to keep the engagement is to be subject to a pecuniary penalty—it is fixed at ten thousand pounds. The purpose it was to be put to when secured, takes us back from the attorney's style-book to the age and its conditions. The money was to be applied for the recovery of the Holy Land, and be dropped into the great fund lost in the crusades.<sup>1</sup>

There was much more in such a document than it ex-

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<sup>1</sup> Lord Hailes seems to have been aware of this document (i. 342). It is given at length by Sir Francis Palgrave.—Documents, 323.

captives of them would be inconvenient, and they were driven across the border.

This was an unpropitious beginning, but it was more emphatic than even the crossing of the Rubicon, and left no alternative but to go on. The sacrilege was a serious blot, which would be employed to its utmost at Rome and elsewhere, but it was not irremediable. There are many symptoms that the Scots people of that day were not ardent devotees of religion, or as some people, looking to the kind of religion then prevalent, would call it, of superstition. The charges made, both in the chronicles of the day and in the state papers, against the Scots as a blasphemous and unholy people, given to sacrilege, would not have been so steadily reiterated if there had not been some ground to hold them a people less religiously inclined, at all events, than the English. The question how far the desecration of the church would tell at Rome would be easily decided by consulting the friendly Lamberton; and he from the first seems to have felt no difficulty about putting the matter right.

The news that a stand had been made against the English invaders flew like wildfire over Scotland, and the people rose so tumultuously and threateningly that Edward's English servants, save where they were protected by fortifications, were glad to hurry out of the country. Bruce immediately took up his headquarters in his own Castle of Lochmaben. The remains still visible show us a building of that age raised on the new and formidable system of fortification which had come over from England. Two hundred miles farther north, in his earldom of Mar, he had his other castle of the same kind, Kildrummy, and he does not appear to have yet given it into other keeping, according to King Edward's order. We must count that a great part of Bruce's subsequent success depended on his holding for some time these strong fortresses.

The way being clear, it was resolved to take a decided step, and solemnly inaugurate Bruce as King of Scotland, according to the old traditional forms of such an occasion, so far as these could be effected. The ceremony dates on the 27th of March, some six weeks after the slaughter of

astounding news to King Edward. He must have known the temper of the people; and remembering how troublesome they were, even when led by an obscure man from the ranks, he could not but see how formidable was the difficulty now that they had among them a crowned and legitimate king. King Edward was then at Winchester, shaken by sickness and bowed by care, getting his way back to London with extreme difficulty, to take steps to meet the new emergency. But if for no worthier things, there was room still in his frail body for hatred and ferocity. The short-lived projects about conciliation and gradual amalgamation dissolved at once; and it is observable that henceforth to his death the fiery rage of the king is visible even through the decorous formality with which the royal scribes were bound to prepare the royal proclamations. In his pious mind the rising would be aggravated, if aggravation were possible, by the conditions of Comyn's slaughter. One of the earliest acts of his vengeance is a deep stain on his chivalry. The Countess of Buchan was caught, and Edward devised a special and ingenious punishment for her. He gave orders for the preparation of a cage—"kage" it is called in the Norman-French of the warrant—of spars; it was to be large enough for a proper chamber, and to be attached to one of the towers of Berwick, and so guarded and placed as to prevent her holding converse with any one but her immediate attendants, who must not be natives of Scotland; and in this she was imprisoned. We are not told so in the minute instructions for the making of the cage, but the English chroniclers tell us that the cage was so hung that she could be seen by passers-by; and the object of restraining her in this form seems to have been that she might be a common spectacle, and an example of the fate in store for those who thwarted the will of Edward.<sup>1</sup> To such acts

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<sup>1</sup> "In domuncula quadam lignea super murum castri Beriwici posita est, ut possent eam conspiciere transeuntes."—Rishanger, 229.

"Sub dio forinsecus suspendatur, ut sit data, in vita et post mortem, speculum viatoribus et opprobrium sempiternum."—Mat. Westm., 455.

Anything that can be said in mitigation of so odious an act is always

Minorites, to excommunicate the Earl of Carrick by the usual sounding of bells and burning of candles.<sup>1</sup> This bull has not the appearance of having been issued in a knowledge of the political conditions of England and Scotland; there had been a murder in a church, reported to the Holy Court by a sovereign, and the usual anathema was immediately issued. The bull seems to have had no effect in Scotland, where thick-coming events gave more immediate occupation to people's thoughts.

It was determined by King Edward that again there should be a mighty invasion of Scotland. Summonses and commissions of array went forth; and to impress all fighting men with the seriousness of the emergency, there was a proclamation, as there had been before, against the holding of idle military pageants, tournaments, jousts, and the like, until this affair with Scotland should be finished.<sup>2</sup> Broken down as he was, he must be carried with his army northwards; but before that army began its march there was a grand state pageant and inauguration. The king's eldest son, the Prince of Wales, a young man in his twenty-second year, was to be knighted, and with him a crowd of the sons of the English barons. He kept his vigil in Westminster Abbey, was then duly dubbed, and being himself within the sacred circle of knighthood, he admitted his companions, some three hundred, who took their vigils in the Temple Church. All London was roused into excitement by the splendour and solemnity of the ceremonies, which devoted the flower of the young chivalry of England to the one engrossing object of the subjugation of Scotland. King Edward, by his own personal part in them, threw a terrible earnestness over these ceremonials. He made, by every sanction he could call up, a vow to devote his remaining days to vengeance for the sacrilegious murder, and the extermination of the rebel king and his followers; and conscious, as it would seem, that the sternest will could not strengthen his tottering frame for a long tough contest, he forecast a plan by which

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<sup>1</sup> *Fœdera* (Record edition), i. 987.

<sup>2</sup> Palgrave, *Parliamentary Writs*, i. 377.

his indomitable spirit might leave an influence after it had fled from the tenement of clay. He exacted a solemn vow that on his death his body should be carried with his army, and never buried until Scotland was subdued.<sup>1</sup>

His preparations for war were not hampered by the slowness of his personal movements. An army reached Scotland early in 1306, under Pembroke the new governor, Clifford, and Percy, with what result we shall presently see. The old king followed slowly, having to take long rest at various points; he set out in the summer of 1306, but it was March of the following year ere he reached Carlisle.<sup>2</sup>

He had the satisfaction yet before he died to reap a small but rich harvest of vengeance. Nigel Bruce, a brother of the king and a youth celebrated for his comeliness, was taken, and afterwards hanged and beheaded. The same doom befell the husband of Bruce's sister, Christopher Seton, and his brother, Alexander Seton. The Earl of Athole, Simon Fraser, and Herbert de Norham, were put to death at London after the horrible form of the execution of traitors; and the chronicles say that Athole, being in some slight degree akin to the royal blood of England, had the distinction that the gibbet he was hanged on was thirty feet higher than the others. There were many inferior victims.

These are the acts that break the spirit of servile races, but only nerve those of higher mettle to defiance. The selection of the victims, too, was of infinite value to the struggling people of Scotland. Hitherto no noble and Norman blood had been drawn by the hangman. When these strangers first acquired lands in Scotland, and afterwards, while they belonged to the English court, they got the name of Frenchmen, and were treated as hostile aliens. But they were of the same race as the people of the land, and gradually we find them changing from Frenchmen

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<sup>1</sup> Of the various accounts of these events in the chronicles, the most spirited is that given towards the end of Mathew of Westminster.

<sup>2</sup> See the stages of his journey, traced by Lord Hailes through the dates of the writs issued by him.

We have repeatedly been reminded, in the course of events, of the Celtic tribes of the west—people who could not easily conform to the sovereignty of the King of Scots, though they were in reality the descendants of those who first brought the name of Scots into the country. It did not make them more docile that the invasions and migrations of the Scandinavians had brought men of the northern Teutonic blood into the original race. The royal prerogative, and the Norman feudal tenure of land, extended over their districts fleetingly, and sometimes nominally only. By the technicalities of the chapel of chancery the king's writs were current there, just as in terms of a proclamation of King Edward, those of the King of England were supposed to be current in Scotland when Wallace governed or Bruce reigned. There was enmity between these Celtic tribes and the Lowlanders of Scotland of a different kind from the enmity that had now grown between England and Scotland. It partook of the antipathy of race; and though it did not come out so powerfully in great contests, it never died. It was the natural condition of these people to be under absolute chiefs and leaders, who set up a mimic royalty. When the local rulers, whether Celts or strangers, were liable to be ruled or scourged through the power of Norway on the sea, there was a certain compactness of rule over the whole vast district. We have seen that there were three rival centres of command,—Dublin, Northumberland, and Orkney; but all stood in awe of the ruler of Norway. When this influence was finally broken by the battle of Largs, another had not as yet replaced it, though the Scotland where now the Lowland population prevailed was naturally in the end to become that influence. Meanwhile, the contest for independence paralysed the power of control, and the combination that seemed long ago to be working itself into a great sea empire was falling to pieces. Even in the Highlands and Isles there was generally more than one king or chief. Had all been under one leader when King Edward began his encroachments, there is no doubt that he would have had thorough help from that leader. As it was, he entered into alliance

## CHAPTER XXIII.

## WAR OF INDEPENDENCE TO BANNOCKBURN.

DIFFICULTIES OF THE NEW KING—POLITICAL POSITION OF THE HIGHLANDS—BRUCE'S WANDERINGS AND ADVENTURES—ACTS OF PERSONAL PROWESS—POPULARITY—FIRST GERMS OF SUCCESS—CONTEST WITH THE COMYNS—ASSISTANCE OF THE CLERGY—THEIR INFLUENCE, SPIRITUAL AND FEUDAL—THE OSCILLATIONS OF ALLEGIANCE—SPECIMEN OF A SHIFTING BISHOP—SIEGE OF STIRLING BY BRUCE—ENGLISH NATIONAL PRIDE ROUSED—EAGERNESS TO DO BATTLE IN SCOTLAND—COLLECTION OF A GREAT ARMY—PECULIAR CONDITIONS OF THE COMING CONTEST AS FIXED BY THE ENGAGEMENT TO SURRENDER STIRLING—THE POSITION OF THE SCOTS ARMY—ITS PERSONAL COMPOSITION—HOW BOTH ADAPTED TO THE OCCASION—THE APPROACH OF THE ENGLISH HOSTS—BRUCE'S PERSONAL PASSAGE OF ARMS—RANDOLPH'S SKIRMISH—BATTLE OF BANNOCKBURN.

Soon after the inauguration at Scone, severe trials came on the new king and his followers. The English army was far too strong for an unorganised rising to make head against it. Pembroke, the Regent, was strongly posted at Perth. Bruce brought his little band too near this enemy, and was attacked at Methven on the 19th of June. It was a surprise and a scattering rather than a battle, but it was a heavy blow to the infant cause; it was in this affair that the greater portion of the captives put to death by the English were taken.

Soon afterwards the party suffered a check from a totally different quarter, which showed that, besides the English claims, there was another formidable difficulty in the way of restoring Scotland to an independent sovereignty.



We have repeatedly been reminded, in the course of events, of the Celtic tribes of the west—people who could not easily conform to the sovereignty of the King of Scots, though they were in reality the descendants of those who first brought the name of Scots into the country. It did not make them more docile that the invasions and migrations of the Scandinavians had brought men of the northern Teutonic blood into the original race. The royal prerogative, and the Norman feudal tenure of land, extended over their districts fleetingly, and sometimes nominally only. By the technicalities of the chapel of chancery the king's writs were current there, just as in terms of a proclamation of King Edward, those of the King of England were supposed to be current in Scotland when Wallace governed or Bruce reigned. There was enmity between these Celtic tribes and the Lowlanders of Scotland of a different kind from the enmity that had now grown between England and Scotland. It partook of the antipathy of race; and though it did not come out so powerfully in great contests, it never died. It was the natural condition of these people to be under absolute chiefs and leaders, who set up a mimic royalty. When the local rulers, whether Celts or strangers, were liable to be ruled or scourged through the power of Norway on the sea, there was a certain compactness of rule over the whole vast district. We have seen that there were three rival centres of command,—Dublin, Northumberland, and Orkney; but all stood in awe of the ruler of Norway. When this influence was finally broken by the battle of Largs, another had not as yet replaced it, though the Scotland where now the Lowland population prevailed was naturally in the end to become that influence. Meanwhile, the contest for independence paralysed the power of control, and the combination that seemed long ago to be working itself into a great sea empire was falling to pieces. Even in the Highlands and Isles there was generally more than one king or chief. Had all been under one leader when King Edward began his encroachments, there is no doubt that he would have had thorough help from that leader. As it was, he entered into alliance

with three of them, who, as they were in some measure rivals, did not always co-operate.<sup>1</sup>

Bruce and his band had, for some cause unexplained, to pass through Athole, and penetrate the Highlands until he reached the edge of the country of one of these chiefs, John of Lorn, who, naturally no friend of Bruce, happened to be a relation of the slaughtered Comyn. There, at Dalry, near Tyndrum, between Loch Awe and Loch Tay, the little party was attacked by a swarm of Highlanders. The contest was one of the kind which gave opportunity to the mounted knights in full mail to show how unassailable they were. To fight face to face with the half-naked horde on their own rough ground was out of the question, and Bruce gained signal honour by the way in which he moved his mailed phalanx away, rendering pursuit deadly to those who came nearest.

Two other affairs come out with some distinctness in the confused history following on the coronation. Bruce wandered into the far west, Arran and Kintyre, seeking, as it would appear, to have a good opportunity for seizing his own Castle of Turnberry, on the Ayrshire coast opposite to Arran. He found it so well garrisoned by Percy that attack was useless. Fortune favoured his adventure, however, in another shape; for in a night attack on Percy's army, close at hand, he caused havoc and panic, and, what was of some moment, gained a valuable booty. He was here among his own people, from whom he would of course recruit his force to the utmost, and he kept Percy blockaded in the castle until a fresh English force made it necessary to move away. The other affair was at no great distance from Turnberry, at Loudon Hill, in the eastern part of Ayrshire. The position was a strong one—a conical trap rock rising out of a sloping base. Here Bruce met an attack by an English force under Pembroke. What we can gather from the romantic traditions of the affair is little more than this, that Bruce intrenched himself strongly, and, following up the tactic of Wallace, de-

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<sup>1</sup> "Litera Alexandri de Argathil; litera Alexandri de Insulis; litera Donenaldi de Insulis."—*Fœdera* (Record edition), i. 761.

fended a strong position by spearmen on foot against the assault of heavy armed cavalry, tempted to make a rash attack by the disparity of their enemy's numbers, and the superstitious reliance on the invincibility of such troops as their own. However it came to pass, the English were driven off so effectually that the affair is recorded as a defeat in their contemporary chronicles, which tell that their leader retreated to Ayr, and thence returned to England.<sup>1</sup>

It is extremely difficult to give distinctness and chronological sequence to the events in Scotland from 1306 to 1310: the conditions are indeed antagonistic to distinctness. We have a people restless and feverishly excited to efforts for their liberty when opportunity should come, but not yet embodied in open war against their invaders, and therefore doing nothing distinct enough to hold a place in history—in fact, if after-events did not attest the determined spirit of opposition then smouldering among the people, the natural inference would be, that they were now thoroughly broken in. The other prominent feature in the historical conditions, was the new-made king, as yet so insecurely seated that he must be treated as a competitor only for a throne. He was not, however, in this capacity holding himself apart in serene dignity until his partisans should come to tell him that the cause of legitimacy is at length triumphant, and a devoted people are impatient for their sovereign. On the contrary, he was doing his own work with labour, peril, and suffering. At one time he has to pass through dangerous ways to look after his interest at some distant spot—again he is pursued, and has to flee for his life and hide himself. Aware of the impossibility of making head for some time against the army of occupation, he had sometimes more to do in keeping his followers quiet and hidden than in embodying them under his command. The history of such a way of life is liable to indistinctness and obscurity; and yet we possess a clear and picturesque narrative of the whole. It is difficult to believe it all, and yet it is so natural and congenial

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<sup>1</sup> See Hemingford, 236.

with three of them, who, as they were in some measure rivals, did not always co-operate.<sup>1</sup>

Bruce and his band had, for some cause unexplained, to pass through Athole, and penetrate the Highlands until he reached the edge of the country of one of these chiefs, John of Lorn, who, naturally no friend of Bruce, happened to be a relation of the slaughtered Comyn. There, at Dalry, near Tyndrum, between Loch Awe and Loch Tay, the little party was attacked by a swarm of Highlanders. The contest was one of the kind which gave opportunity to the mounted knights in full mail to show how unassailable they were. To fight face to face with the half-naked horde on their own rough ground was out of the question, and Bruce gained signal honour by the way in which he moved his mailed phalanx away, rendering pursuit deadly to those who came nearest.

Two other affairs come out with some distinctness in the confused history following on the coronation. Bruce wandered into the far west, Arran and Kintyre, seeking, as it would appear, to have a good opportunity for seizing his own Castle of Turnberry, on the Ayrshire coast opposite to Arran. He found it so well garrisoned by Percy that attack was useless. Fortune favoured his adventure, however, in another shape; for in a night attack on Percy's army, close at hand, he caused havoc and panic, and, what was of some moment, gained a valuable booty. He was here among his own people, from whom he would of course recruit his force to the utmost, and he kept Percy blockaded in the castle until a fresh English force made it necessary to move away. The other affair was at no great distance from Turnberry, at Loudon Hill, in the eastern part of Ayrshire. The position was a strong one—a conical trap rock rising out of a sloping base. Here Bruce met an attack by an English force under Pembroke. What we can gather from the romantic traditions of the affair is little more than this, that Bruce intrenched himself strongly, and, following up the tactic of Wallace, de-

<sup>1</sup> "*Lucia Alexandri de Argythol; Lucia Alexandri de Jure*" & "*Lucia de Jure de Jure*."—*Parler de Jure*, ed. de Jure.

mountaineer after him, while the third alighted behind, and, grasping him tightly, tried to help in the unhorsing. The hero, twisting himself round, cleft his head, and then, having no more to deal with, cut down the man dragged at the stirrup.<sup>1</sup>

This was a natural enough shape for a contest between a strong mounted man-at-arms with three fierce savages. Other achievements of the Bruce are not quite so credible. In Galloway he finds himself with but two attendants beset by a party of the wild natives, some two hundred in number. - He takes his station in a pass or cleft so narrow that only one man on horseback can pass through it at a time. Up comes a mounted Galwegian ; he and his horse are at once slain by the king. Another and another comes up, to share the same fate, and the cleft is so choked up with dead men and horses that the others cannot approach. The noise of the contest is heard by Bruce's party, who come up to the rescue, and the Galwegians retreat. Still another incident. When hard pressed by pursuers Bruce and his band would scatter, each taking his own way, and leaving the enemy perplexed as to the direction in which they were to seek the great prize. Once finding himself in the presence of a double army of his enemies, commanded by Pembroke and John of Lorn, this tactic was tried. The Highlanders had, however, got hold of a bloodhound once belonging to Bruce himself, and set him on the trail. He heard the baying and knew the danger. Coming to a stream, he waded some way up, then mounted into a tree, caught suspended branches, and swung himself a good way on from tree to tree before he alighted on the ground—so the hound would find the place where his feet had entered the stream,

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<sup>1</sup> Barbour says of the two brothers :—

“Thar surnam was Makyndrosser,  
That is all sa mekill to say her,  
As the Durwarth sonnys perfay.”

Shaw in his Gaelic Dictionary has “dorsair” for doorkeeper. One would hardly have expected that the Archdeacon of Aberdeen would have condescended to notice such a Celtic etymology. It was in this encounter that “the brooch of Lorn” was seized.

hatred of their invaders had taught the people to tell and hear with exultation. The story may serve to close the brief string of incidents, selected rather to show the nature of the things which the people delighted to hear concerning their favourite hero and his companions, than as events which can be vouched for as absolutely true.<sup>1</sup>

It must be held beyond all doubt, that the turning-point in the recovery of the independence of Scotland was the death of King Edward in 1307. The work to be done required such a leader. Communities may grow strong or weak—some may become aggressive and dominant, while others sink into servility or decay; these phenomena are

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<sup>1</sup> The book, half epic half chronicle, which is the great storehouse of these adventures, is known to readers of old English literature as 'The Bruis,' by John Barbour, Archdeacon of Aberdeen. Scotland is fortunate in the possession of such a memorial. The national hero of a country is seldom thus celebrated until centuries have passed and the manners have utterly changed. The chronicle or romance, whatever it may be called, is then an echo of the manners of its own day, not of the age it professes to commemorate. The whole school of Arthurian romance is an eminent instance of this. Barbour, however, was at his studies at Oxford within thirty years after Bruce's death. The Archdeacon was not a man of bold or luxuriant imagination, whence one is apt to give the more faith to his narrative. It has been accepted pretty freely into history, even by the dry and doubting Lord Hailes. Yet Barbour sets out with a statement showing a determination to subordinate facts to his notion of the artistic structure of a story, calculated somewhat to appal the searcher after truth. He makes his hero the same Bruce who was competitor for the crown in 1291, thus identifying the hero of the tale with his own grandfather, and in fact finding materials for this hero in three generations. This enabled him to tell how the Bruce scornfully refused to hold Scotland as a fief of England, so that Baliol, who was so base as to accept the crown on such terms, was chosen in his stead.

There are three standard editions of 'The Bruce'; one by John Pinkerton, well known to every student of our early history; the second by Dr Jamieson, the author of the Scots Dictionary; the third by Professor Innes for the Spalding Club. The popular editions, with more or less variation from the stricter texts, are innumerable. The book has recently been taken up by the critical inquirers into the fountains of the English language and literature. A portion of 'The Bruce; or, The Book of the Most Excellent Prince Robert de Bruce, King of Scots,' is edited for the Early English Text Society by the Rev. Walter W. Skeat.

and their vengeance was remembered in local tradition as the "heirship" or "herrying" of Buchan.<sup>1</sup>

There remains a brief casual testimony to the extent of the ruin inflicted, and the hero's compunction for at least one class of the sufferers. The old well-endowed Columbite monastery of Deer suffered with the other landholders in the obnoxious district. The community naturally took part with the lord of the soil, and in 1296 Bruce the abbot swore fealty to King Edward at Berwick. Within a year after the victory of Bannockburn, Bruce granted to the monastery a charter professing to render compensation for the injuries inflicted on the community during the recent wars, confirming to the community in free gift all the churches, lands, and possessions that the lords of Buchan and other magnates had professed to confer on them.<sup>2</sup>

The English were driven out of the strong places one by one—sometimes by the people of the district. We hear of the fall of Edinburgh, Roxburgh, Linlithgow, Perth, Dundee, Rutherglen, and Dumfries. In Aberdeen there was a fortress with an English garrison, yet Bruce and his followers were received in their hour of need by the citizens, and when his prospects brightened the English garrison was driven out. The city long enjoyed a tradition telling how the English garrison were put to death, every one of them—for to have done something towards the extirpation of the English invaders was a source of legitimate pride in any part of Scotland.<sup>3</sup> The fortresses thus taken seem to have usually been of the

1 "Gert his men turn all Buchan  
Frae the tiller, and the siller, and the  
And herryt them on the mair,  
That efter that, twa fifty yair,  
Mear many the landship of Buchan."

—THE BUCHAN, p. 110.

Barbour's abode was close to the district of Buchan.

<sup>2</sup> Third Report of Historical MSS. Comm., Ap.

<sup>3</sup> Hector Boece said the bones of the English were to be seen in Friday with inscriptions narrating the manner of their death. As also that the Church made the citizens ever after do penance by retiring to the chapel of the castle every Sunday and praying for the English slain. See in the 'Book of Bannockburn,' p. 32, an examination bringing home the whole story to Hector Boece's inventive genius.

grandfather, and thereupon they proffered to him their homage and allegiance. Among the adherents to this manifesto were Lamberton, Bishop of St Andrews, and the Bishops of Glasgow, Dunkeld, Aberdeen, Moray, Dunblane, Ross, Caithness, Brechin, the Isles, and Gallo-way.<sup>1</sup>

This was an extremely important matter, for it meant, of course, that the Church would do its best to protect him from all ecclesiastical risk arising from the death of Comyn. This powerful backing was no doubt due to the restless Lamberton. He had been for some time a prisoner in England, where he expressed much contrition for the past, and loyalty to the cause of English ascendancy. On his earnest representation that he could better serve the cause of Edward in Scotland than where he was, he was released; and this was the way in which he fulfilled his obligation.

There was, indeed, ere the revolution had come this length, a great deal of oath-breaking and counter-swearing. Part of it was voluntary, as when those whose homage had been exacted by Edward found themselves free. A considerable portion of it was no doubt forced on unwilling subjects by the new Government; for the Norman barons who held lands in Scotland had not all turned Scotsmen—the sympathies of many of them were with the English Court.<sup>2</sup>

Of course the breaking of an oath has an ugly sound, and is not to be lightly spoken of; yet, like all other offences, it has to be measured by the special conditions and prevalent doctrines of the time. We have seen the practice of oaths of allegiance coming into universal use with the feudal system: it was, along with the marriage

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<sup>1</sup> Act Parl. Rob. I., first vol. of Scots Acts, 100.

<sup>2</sup> Sir Francis Palgrave gives an instance of homage coercively exacted by Bruce, which he seems to think more unjust and tyrannical than anything he found King Edward doing. It is in a memorial to King Edward and his council by Malice, Earl of Strathearn, which "is extremely interesting, as showing the force and duress exercised by the Bruce against or upon all who dared to adhere to their own allegiance."—Documents, clix. 319.



ness—they were surer of what they were about. In the great contest for independence, the oaths broken by ecclesiastics are about a hundred per cent more in proportion than those broken by laymen.<sup>1</sup>

Another unpleasant feature disturbs the harmonious picture of an oppressed people driving forth the invader

<sup>1</sup> Sir Francis Palgrave becomes unintentionally picturesque in the rubrics or marginal indications given by him, when he brings forward the record of the retractions of the two eminent prelates Lamberton and Wishart :—

“The king’s enemies being defeated, Lamberton changes sides ; takes the oath of fealty again to the king ; receives back his temporalities, &c.

“Confidence reposed by Edward I. in Bishop Lamberton. He is appointed chief of the royal lieutenants or governors.

“Lamberton changes sides again, and steals off to Bruce.

“Lamberton treacherously places the son and heir of the Stewart (who had been given as a hostage by his father) in the power of the Bruce.

“The king’s power increasing, Lamberton changes sides again ; surrenders himself to Sir Aymer de Valence, and takes another oath of fealty to the king ; after which he changes sides again, and sends forces to the assistance of Bruce.

“The Pope requested to punish such acts of perjury and treason.

“Bishop Wisheart takes the oath of fealty for the *first* time.

“And breaks his *first* oath, abetting Baliol in all his treasons.

“Bishop Wisheart, upon Baliol’s submission, takes the oath of fealty for the *second* time.

“Bishop Wisheart takes two more oaths, and promises fealty for the *third* time.

“Bishop Wisheart takes advantage of the king’s absence, breaks his *second* and *third* oaths, and instigates the rising of Bruce and Wallace.

“Bruce’s affairs appearing to decline, Bishop Wisheart changes sides again ; submits, and becomes one of the sureties for Bruce.

“Bishop Wisheart changes sides again, and goes over to the Bruce.

“Bishop Wisheart appears to change sides again, and surrenders himself to Edward.

“Bishop Wisheart charged with having made such his surrender out of treachery, and that he might betray Roxburgh Castle to the enemy.

“Bishop Wisheart treated most courteously by Edward—enlarged upon his parole. He takes the oath of fealty for the *fourth* time.

“Bishop Wisheart breaks his *fourth* oath, changes sides, and sends forces to act against the English.

“Edward having defeated his enemies, the bishop changes sides

that they might regain their liberties and enjoy them in peace. Peace was not yet among the objects of the Scots. King Edward complained that they broke the truces he had conceded by desire of the King of France. They made more than one raid through unhappy Cumberland, in one of them reaching Durham, where they did much mischief. The English chroniclers charge the marauders with all the horrors which it had been for centuries the practice to attribute to a border invasion by the Scots. The son of the man who had twice overrun Scotland was assailed by the piteous wails of his own English subjects—victims from the masterful Scots invaders. Beyond the suffering districts, the calamity was made known in the disagreeable shape of the exaction of a forced loan to protect England against Robert Bruce and the Scots.<sup>1</sup> If the voice of prudence could be heard in the tumult of such wild retaliation, it would tell that the Scots could take no surer way of proclaiming to England that Scotland should be reconquered.

A crisis came at last which roused the Government of England to a great effort. After the fortresses had fallen one by one, Stirling Castle still held out. It was besieged by Edward Bruce before the end of the year 1313. Mowbray, the governor, stipulated that he would surrender if not relieved before the Feast of St John the Baptist in the following year, or the 24th of June. The taking of this fortress was an achievement of which King Edward was prouder than of anything else he had done in the invasion of Scotland. He made it of far more moment than even his victory

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again; takes the oath of fealty for the *fifth* time, and acknowledges that he holds his temporalities of the king.

"The bishop takes the oath of fealty for the *sixth* time, and with great solemnity.

"After which he changes sides again, and assists Bruce *totis viribus* in his assumption of the royal authority.

"These matters notorious to all the world.

"The bishop refuses to return to his allegiance.

"Preaches to the people that fighting against the King of England is as good a work as a crusade."

<sup>1</sup> The assessment of this loan on the clergy is given at length in Palgrave's Parliamentary Writs, ii. 105.

over Wallace at Falkirk. Its possession was a significant symbol that there was still a hold on Scotland, for it commanded the gate, as it were, by which the two great divisions of the country could hold intercourse with each other. That the crowning acquisition of their mighty king should thus be allowed to pass away, and stamp emphatically the utter loss of the great conquest he had made for the English crown, was a consummation too humiliating for the chivalry of England to endure without an effort. Stirling Castle must be relieved before St John's Day, and the relieving of Stirling Castle meant a thorough invasion and resubjection of Scotland. The great barons, who had been at discord with the king about his favourite, Pierce Gaveston, and other things, now set to work in the great cause, and the lazy king was thus the nominal director of a military drain upon the country more thorough than his determined and untiring father had ever accomplished. Besides the feudal force of England, dragged out by all forms of summons and array, the king demanded the attendance of his Welsh subjects. After the example of his father, he issued personal requisitions to the kings or chiefs of "The Irishry."<sup>1</sup> Against the kind of enemy they were to meet, neither of these two elements could be of much benefit to the army, and they were probably rather a hindrance than a help.

Perhaps there never was a battle of which the conditions as to both armies were so distinctly preadjusted and so inevitable, as that which was to come. The time and the place were fixed by an obdurate necessity. The English were to relieve Stirling Castle; the Scots must prevent them. If they attempted to meet the invaders at any distance from this point, they ran two risks. If the enemy were not met and fought, these might outflank the Scots and reach the castle. If the Scots did meet and fight, it might be on bad ground, and that would be fatal. The

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<sup>1</sup> They are addressed by such titles as—Eth Offlyn dux Hibernicorum de Turtery; Doneval O'Neil dux Hibernicorum de Tyrowyn; Lauercath Mac Wyr dux Hibernicorum de Lougherin; Gillys O'Railly dux Hibernicorum de Bresfeny; Felyn O'Honoghur dux Hibernicorum de Connach, &c.—*Fœdera* (Record edition), ii. 245.

battle, therefore, must be under the walls of the castle. Certain writs issued in England so early as the 27th of May set forth, for the purpose of exciting the warlike spirit of the country, that the Scots intend to assemble in great numbers on certain strongholds and morasses inaccessible to cavalry, in order that they may prevent the Castle of Stirling from being relieved before the Feast of the Nativity of St John ; and if the relief be not effected the Constable must surrender the castle, according to conditions between him and the enemy. That any force Bruce could gather should meet so mighty an army as England was collecting, otherwise than on strong selected ground, was out of the question. It was the fortune of the Scots that the ground provided for them was nearly as good—perhaps quite as good—as any they could have selected ; and there was this further advantage, that however strongly they were posted, the English must attack them there, and could not evade the battle.

Stirling Castle stands on a trap rock rising out of a basin, and one does not pass far from it before beginning to ascend. To the south, and partly to the east and west, the ascent is on the Campsie Fells, a chain of hills neither very lofty nor very precipitous, but affording ground capable of being made very defensible. Here the Scots army were to meet the enemy ; indeed nowhere else could they do so ; and Bruce occupied himself in fortifying the position. To the right it was well protected by the brawling rivulet the Bannock Burn, which gave a name to the contest. Had they only to choose the strongest post and meet an attack, it had been a simple affair ; but there was a tract of flat ground through which an army might pass to the gate of Stirling Castle, and that must be seen to. This tract was therefore honeycombed with pits, and the pits were covered with branches strewn with the common growth of the neighbourhood. This was done, not with the childish expectation of catching the English troops in a trap, but to destroy the ground for cavalry purposes.<sup>1</sup>

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<sup>1</sup> Between the slope of the fells and the flat carse the ground undulates. The undulations, in general, have no direction like the fells,

On the 23d of June the two armies were visible to each other. If the Scots had, as it was said, between thirty and forty thousand men, it was a great force for the country at that time to furnish. Looking at the urgency of the measures taken to draw out the feudal array of England, to the presence of the Welsh and Irish, and to a large body of Gascons and other foreigners, it is easy to be believed that the army carried into Scotland might be, as it was said to be, a hundred thousand in all. The efficient force, however, was in the mounted men, and these were supposed to be about equal in number to the whole Scots army. This great host was apparelled with unusual magnificence. Had it been assembled for some object of courtly display, it would have been a memorable exhibition of feudal splendour. The countless banners of all colours and devices, and the burnished steel coats of the many thousand horsemen glittering in the summer sun, left impressions of awe and admiration which passed on from generation to generation.

There are efforts, not always successful, to describe the exact division and disposal of the Scots army. It seems more important to keep in view the general tactic on which its leader was prepared with confidence to meet so unequal

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but are isolated gravel hills. Of these, however, one portion goes in a transverse direction from the declivity of the fells towards the caise in such manner that one can easily suppose it concealing from those in the upper ground a party moving along the level, close under its shelter, and can also understand how, on this movement being detected, troops could be carried round the shoulder of the transverse mound, so as to come by surprise on those attempting the relief. It is also, from the nature of the ground, easily to be understood how a leader placed where all the field was visible—as, for instance, at the spot now called the “Bore Stone”—could see any such attempt, while a leader on duty further down could not. This refers to the ground on which occurred an affair which has to be told as preliminary to the great battle, the defence of the passage by Randolph against Clifford. How far the stream of the Bannock protected a flank must have depended on the preceding weather. In places its banks are steep. It has generally now little volume of water, being diverted for manufacturing purposes. Among the dirty pools in its bed in the filthy manufacturing village, the multitude of large boulders brought down by it show that it has been at times a powerful stream.

a force. It was the same that Wallace had practically taught, and it had just recently helped the Flemings to their victory of Courtrai. Its leading feature was the receiving charges of cavalry by clumps—square or circular—of spearmen; and simple as it was, it was revolutionising the military creed of Europe by sapping the universal faith in the invincibility of mounted men-at-arms by any other kind of troops. Bruce had a small body of mounted men, but he was not to waste them in any attempt to cope with the English cavalry; they were reserved for any special service or emergency.

For the hopes of Scotland the great point was that the compact clumps of spearmen should be attacked upon their own ground. But there was a serious danger to be met beforehand. Holding the approaches to the castle from the east was far more difficult than holding the ground of the main army. If any body, however small, of the English army could force this passage, and could reach the castle gate or the sloping parts of the rock, the primary object of the invasion would be accomplished. The castle would be relieved, and the English army, no longer bound to attack the Scots on their own strong ground, could go where it pleased; and in fact this movement, so dangerous to the Scots, had been wellnigh accomplished. It was the duty of King Robert's nephew, Randolph, with a party told off for the purpose, to guard the passage. The king observed that a party of eight hundred horse under Clifford were making a circuit, evidently with the purpose of reaching the passage, and that no preparations were made to receive them. He pointed this out to Randolph with a severe rebuke for his negligence. Burning to redeem his honour, he ran on with a body of spearmen, who planted themselves in the way of the English horsemen, forming a clump with spears pointing forth all over it like the prickles of a hedgehog. The horse attacked them furiously in front without breaking them, then wheeled round and round them, vainly assailing them from all points. From a distance the little party seemed doomed, and Douglas hastened with a following to their rescue, but as he approached the aspect was more cheering. It was not

of camp-followers on the sky-line of a neighbouring hill, who were mistaken for a fresh army of the Scots. The end was rout, confused and hopeless. The pitted field added to the disasters; for though they avoided it in their advance, many horsemen were pressed into it in the retreat, and floundered among the pitfalls. Through all the history of her great wars before and since, never did England suffer a humiliation deep enough to approach even comparison with this.

Besides the inferiority of the victorious army, Bannockburn is exceptional among battles by the utter helplessness of the defeated. There seems to have been no rallying-point anywhere. There was enough of material to have made two or three armies capable, in strong positions, of making a troublesome stand, and, at all events, of making good terms. But none of the parts of that mighty host could keep together, and the very chaos among the multitudes around seems to have perplexed the orderly army of the Scots. The foot-soldiers of the English army seem simply to have dispersed at all points, and the little said of them is painfully suggestive of the poor wanderers having to face the two alternatives—starvation in the wilds, or death at the hands of the peasantry. The cavalry fled right out towards England: why men with English manhood should have done so is a mystery. It was like the Scripture saying that the wicked flee when no man pursueth, for the little band of Scots mounted men was far too small for pursuit, and could not be let loose by any prudent commander among the vast mass of cavalry breaking away.

Perhaps this helplessness in flight, as also many other incidents of disaster, may be attributed to one cause—to the command being taken by the king himself, with his utter incapacity for the task. The only little gathering out of the dispersal of that huge army seems to have been a body of 500 knights who rallied round the king, but it was only to attend him in his headlong flight. To the Lothian peasant the mighty King of England galloping past like a criminal fleeing from justice must have been a sight not to be presently forgotten. The king reached

## CHAPTER XXIV.

WAR OF INDEPENDENCE TO THE DEATH OF  
ROBERT BRUCE.

EFFECT OF THE BATTLE OF BANNOCKBURN—A PARLIAMENT, AND THE ADJUSTMENT OF THE SUCCESSION—THE BRUCES INDUCED TO BECOME LEADERS OF THE IRISH NATIONAL PARTY—CAUSE OF THE IRISH SEEKING THEM—THE QUESTION OF THE INDEPENDENCE AGAIN BEFORE THE PAPAL COURT—ADVENTURES OF A CARDINAL EMISSARY SENT TO BRUCE—RECAPTURE OF BERWICK—BAFFLED ATTEMPTS OF ENGLAND TO RECOVER IT—RAID ON ENGLAND—A PARLIAMENT—THE SOLEMN ADDRESS TO THE POPE, AND RESOLUTION TO HOLD BY INDEPENDENCE—A GREAT INVASION OF SCOTLAND AGAIN ATTEMPTED—ITS FAILURE, AND THE METHOD OF IT—REVENGE TAKEN BY RAIDS ON ENGLAND—SUFFERINGS OF THE ENGLISH PEOPLE—DISAFFECTION IN THE NORTH—AID OFFERED TO SCOTLAND—INTERVENTION OF THE POPE—INVASION OF ENGLAND—THE TREATY OF NORTHAMPTON—THE DEATH OF BRUCE.

FOR a few years after the battle of Bannockburn there was little to stir the exhausted country save marauding incursions into England in the old cruel manner. They reached as far as York, and carried terror of the name of Scot into the very heart of England. Yet if such things have a justification, it was furnished by the perversity of the English king or his advisers. King Robert wrote to the King of England, saying there was nothing he so earnestly sought as a permanent good understanding between the two kingdoms. The King of England appointed commissioners to meet those of Scotland, but he would not concede the independence demanded of him, or treat Bruce as a sovereign.

On the 1st of May 1315, a Parliament was held to adjust



the order of succession. The nearest relations of Bruce were his daughter Marjory, his brother Edward, and his nephew Randolph. If the king left a son, he was to succeed. It was provided that, should there be no son, there might be a deviation from the pure hereditary rule on account of the necessity of a male ruler for Scotland in its present position. It was set forth that his daughter was the heir-apparent, but she had given her consent to be passed over for Edward Bruce, whose prowess as a warrior would be of infinite value.<sup>1</sup>

Among other provisions for contingencies, some of them far off, should the succession open to a minor, the king's nephew, Randolph of Moray, was to be guardian of the kingdom.

Thréé years afterwards this arrangement had to be readjusted. Edward Bruce had been killed in Ireland, and the king's daughter, Marjory, had been married to the Steward of Scotland, and had died, leaving a son. By the Act of 1318 that son was heir of the crown, unless King Robert should leave male issue, as he did. By the same Act the principle of the succession to the crown of Scotland was laid down so as to obviate any misunderstanding of the divergence, made by the Act of 1315 for special purposes. The succession, not being subject to partitions like a private fief, was to go first to the male issue of the sovereign in their order of birth, next to the female issue, and these being exhausted, then to collaterals in the same fashion. The Act is thus an exposition of that pure law of hereditary descent which now renders the succession to the British throne as distinct and certain as any process in the exact sciences. If the principle had been admitted in England as distinctly as it was stated in the Scots Act, there would have been no room for the Wars of the Roses.<sup>2</sup>

The king appears soon afterwards to have gone with a force into the dominions of John of Lorn, which, as the chroniclers say, he brought under his subjection. These Celtic communities had, however, an elastic nature, which

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<sup>1</sup> Scots Acts (Record edition), i. 104.

<sup>2</sup> Ibid., i. 105.

enabled them to bear a conquest lightly, and resume their old condition when it was over. The notices of this expedition are of the briefest, and it left no mark in the reduction of these regions under the feudal organisation of the kingdom.

This occurred in the middle of a larger enterprise, which touches, but does not belong to, the history of Scotland. Edward Bruce, the king's impetuous and chivalrous younger brother, was invited to liberate Ireland from the English yoke, and threw himself impetuously into the project. This enterprise, however, was undertaken under conditions which give it an interest in both islands. If the people of Scotland were likely more keenly to resent, and more determinedly to resist, the Norman invaders than the Irish were, yet these were likely, after long continuance, to find the yoke more galling, since their masters brought with them that antipathy of race against race, which is hardened rather than softened by political combination. It was all the worse for the unhappy Celt that the Norman and the Saxon had common elements of brotherhood, which outgrew the political effect of conquest; this only enhanced the number of the Irishman's oppressors. For the natives there was hardly any law or political protection. In a remonstrance sent by a body of the chiefs to Pope John XXII., they assert, among other grievances, that the murder of an Irishman was not punished as a felony, and that it was held as doctrine, and uttered by the English clergy, that it was no more crime to slay a native than to kill a dog. The chieftains announce that, influenced by these and suchlike intolerable oppressions, they have called for aid on Edward de Bruce, the illustrious Earl of Carrick, brother-german of the most illustrious Lord Robert, by the grace of God King of the Scots, and a descendant of some of the most noble of their own ancestors.<sup>1</sup>

Now that England was making no serious menace—

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<sup>1</sup> This remonstrance, as given in the *Scotichronicon*, has been accepted by the Irish archaeologists. See Todd's *Life of St Patrick*, p. 237, and authorities there referred to.

was, in fact, for the time intimidated—any opening for the temporary employment of the fighting men of Scotland seems to have been gladly welcomed; and Edward got the use of a large force. His brother, King Robert, followed him with reinforcements, becoming a leader in a formidable war, as if the future of his own country did not provide him with a sufficient amount of serious occupation. The adventures and achievements of the two are among the most exciting chapters in the romance of war. Many brave Scots were thus lost to their own country in the hour of need that was coming. Among the deaths, the most conspicuous was that of Edward Bruce himself; but that it was a loss to his country is open to question, for, gallant and popular as he was, his reputation was not of the kind that promises a good pilot in a storm.

There are some mysteries yet to be solved in this curious episode in history, so far as the motives and object of the Bruces are concerned. The natural solution is, that a Norman knight having by his sword achieved for himself a kingdom in Scotland, here was another Norman knight, his brother, who thought he might make a venture for equal fortune in another country where the people were kicking against the English yoke. On the other hand comes the question, whether any tradition of the claims through which the Scots of Albion professed to rule the Scots of Ireland may have lingered, and reappeared to create a mimicry of the English demands of superiority over Scotland, in the theory that Ireland should be held as feudally subordinate to the crown of Scotland.<sup>1</sup>

We now, after an interval of some years, find the political condition of Scotland pressing for serious consideration at the Papal Court. We have seen how thoroughly the merits of the case for Scotland were understood there at the time when Baliol was nominally king. For some time afterwards there came nothing from that tribunal but

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<sup>1</sup> The chief information, beyond the usual chronicles, about the invasion of Ireland by the Bruces, is perhaps to be found in the *Annals of Ireland*, by Friar Clyn and Thady Dowling, edited for the Irish Archaeological Society by Dean Butler.

one or two injunctions to the Scots to preserve peace and order, which were uncertain in their sound, and certainly were not friendly. The remark generally made on this change of tone is, that the Pope was deserting his allies the Scots; but in reality it was in the Papal Court as it is in other courts—there were no suitors connected with the disputes in Britain pushing their cause there, and so there was no corresponding business done. Bruce's slaughter of the Red Comyn was a clear case of discipline, apart from all national questions, and excommunication was issued, but it was unheard in the din of war. After the ruin that had fallen on his invading force, the King of England had a keen desire for peace, but the Scots would not let him have it unless he acknowledged their independent sovereignty. Application was made to Rome for a pacificating bull, which was issued. It was addressed to our dearest son in Christ, the illustrious Edward, King of England, and our beloved son, the noble Robert de Bruce, conducting himself as King of Scotland. It lamented the loss of Christian blood in civil wars, when the rescue of the Holy Land was in vain calling for champions, and adjudged a truce between the countries for two years, excommunicating those who might break it.<sup>1</sup>

The Papal Court no doubt acted under the influence of England on this occasion; but Scotland, a country that had been able to free itself and establish a government in thorough co-operation with the local Church, was entitled to serious consideration. There were some internal affairs in England at the same time demanding attention; and the Pope appointed two cardinals on a mission to England, with a staff of assistants and attendants worthy of so august an embassy. They arrived in England in the autumn of 1317. The cardinals sent two messengers, under a safe-conduct, to transact their business with the King of Scots. These wrote a confidential account of the result to their masters. It described a very curious interview, with a vivacity almost unnatural among the solemn writs of the Papal establishment. The messengers found

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<sup>1</sup> *Fœdera* (Record edition), ii. 317.

chandise. The English had now possessed it for above twenty years, and trade seems naturally to have flowed to it in their hands as it flowed before. The continual contests surrounding the place afterwards gradually rendered it unpropitious to the merchant and the shipper—it is certain that in later times its harbour was not suited for a maritime trade. It is possible that in the course of centuries the depth of water may have decreased; but probably, like many other deserted seafaring places in Scotland, it could accommodate the small craft of the thirteenth and fourteenth centuries, although insufficient for the heavier vessels of modern times.

This loss seems to have roused the energies of England. Bruce determined to preserve the fortress instead of leveling it as he had many others. It would appear, indeed, that the English had replaced the old lumbering fortifications of the Scots with a regular fortress in their own Edwardian style, some remnants of which may still be seen conspicuous among the glacis and counterscarps of that Vauban school which was again to replace the Norman. The acquisition was hence not to be thrown away, and Bruce made immediate preparations against an attack which he knew would exhaust every available resource of the mechanical science of the day. The Scots were then, and for centuries afterwards, poor engineers; they were better soldiers in the field than on the wall, and were often beholden to skilful foreigners in siege-work. For the protection of Berwick they had the aid of a skilful Flemish engineer named Crab; and to meet the gigantic operations of the enemy they had need of all he could do for them.

There were some remarkable specialties in the siege suggested by the nature of the ground. On the flat sandy plains to the north great mounds were raised and ditches dug—a fortress, in fact, was constructed to prevent the approach of an army of relief on the side of Scotland. Before it could help Berwick such an army must thus take a place nearly as strong. There must have been reasons, though they are not very distinct, why Bruce should have found it necessary to allow such works to go on. Next an attack of a peculiar kind was made from the sea. It was

busily preparing engines for the siege of Berwick. He would not acknowledge anything not addressed to him as king. The monk preferred two requests—to be allowed to go forward to the Scots clergy and transact his business, or to be sent with a safe-conduct to Berwick. Both were denied; and attempting to find his way back he fell among thieves, who robbed him of all his Papal documents. The monk was of opinion that in this illegitimate form the parchments found their way to “the said Robert Bruce”—and the supposition is probable enough.

A new bull, heaping upon previous offences the contumely thrown on the Papal messengers, was sent to the cardinals, with vehement instructions to enforce it, along with the personal excommunication of Bruce for the slaughter of Comyn. There are certain established channels, however, through which all judicial writs, ecclesiastical or civil, must find their way to the persons affected by them; and through the national sympathies of the faithful clergy, it came to pass that no hostile documents from Rome could be legitimately served within Scotland.

There was perhaps more than one reason why the emissary of the cardinals should not be permitted to return peaceably to Berwick. He had seen, and apparently had examined with a critical eye, the engines which the Scots were preparing for the siege of that town, working at them, as he said, day and night to accomplish their wicked ends.<sup>1</sup> The siege seems to have been a far easier affair than Bruce expected to find it. There had at that time, indeed, fallen upon the English one of those fits of gloom and depression which have been known to visit the bravest nations after very heavy military disasters, and to make them act for a time like a doomed race with whom nothing can prosper. The town was entered almost without resistance, friends within having, it was said, given secret assistance. Even the castle held out feebly, and again their commercial capital belonged to the Scots. It was said that they in their turn found it full of costly mer-

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<sup>1</sup> *Fœdera* (Record edition), ii. 340.

phrase, of "creating a diversion" in favour of the garrison of Berwick. There had been two or three attempts by the English, both by sea and land, to retaliate on Scotland, but anything done leaves faint and feeble traces when set beside the terrible havoc worked in the northern counties of England. For a time after the proclamation of the Papal peace there was a profession of observing it in England, but there was none in Scotland; and unless the English were prepared to submit to everything, they must break the Papal peace too. Their chief stand was made in a peculiar manner, intended, no doubt, to bring up in their cause influences against which the arm of the flesh is as naught. The Scots were commanded by Douglas and Randolph—both in the early prime of life, and now, by hard and varied service, thorough adepts in all that a military leader of the day could know or do. Discontent kept away many who should have served in the English feudal force, and the part embodied was exclusively devoted to the siege of Berwick. The defence of the north devolved on the Archbishop of York, under whose auspices an army was improvised. A number of the ecclesiastics, carried off apparently by an expectation of a special intervention, joined this force. They seem to have been utterly untrained in war, and to have known so little of the use of the armour and weapons, that these came as unhandily to them as those of King Saul to David. This motley force met the Scots invaders at Mitton, near Borough Bridge in Yorkshire, on the 20th September 1319. But not the sacrilege of the Scots in scorning the Papal peace, nor the holiness of the cause which had brought champions from the cloister, nor the sacred sacerdotal character of these champions, could hinder the arm of the flesh from prevailing. Scots spearmen, now thoroughly hardened to war, made a memorable havoc among them. Three thousand is the number said to have been left dead—enough for a critical battle; and the conquerors in their pleasantry called the affair the *Chapter* of Mitton, on account of the prevalence of the ecclesiastical feature among their victims.

The northern counties of England had now suffered for





each carrying additional emphasis from the failure of its predecessor. Thus the records of the time are strewn with these fulminations against Scotland, while the nation is supposed to have remained in serene calm, unconscious of the ecclesiastical storm outside. Everything was of course done by England that could be done to give efficiency to the Papal edicts. The occasion of the adjustment of the truce was not lost—in fact, it was improved in a manner creditable to the ingenuity of the King of England's advisers. He could not treat with an excommunicated man like Robert Bruce without obtaining a Papal dispensation for doing so; he applied for the dispensation, and it was graciously conceded.<sup>1</sup>

In a Parliament assembled in the Abbey of Arbroath, a solemn address to the Pope was adopted on the 6th of April 1320. In the last appearance before the Papal Court, Scotland had made a powerful impression. The country had since let the enemy get the ear of that tribunal, with no perceptible effort to counteract the influence; and had borne, almost unmoved, the torrent of Papal invective consequently scattered against it. And now, in making once for all a great remonstrance against the wrongs thus accumulated on the nation, the Scots Parliament were successful in accomplishing their object, with a becoming and mournful dignity that has made their remonstrance illustrious among the utterings of national wrongs and appeals for national mercy and justice. At the beginning a word is said in answer to the English fabulous genealogies which carried back the subjection of Scotland to the Trojan line of succession; but this is quickly abandoned, and Scotland pleads her immediate cause, thus:—

The country had been in peace and content, and unpractised in war, when the great King of England, finding it so and without a head, under the guise of friendly intervention, attempted to destroy its liberties and conquer

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<sup>1</sup> "Ad Papam pro licentia habendi tractatum cum Scotis quamvis excommunicatis."—*Fœdera* (Record edition), ii. 391. "Bulla de licentia tractandi de pace cum excommunicatis."—*Ibid.*



As appropriate to this point, the Pope's memorialists venture on a general political remark. They say that the great states are entirely occupied in attempts to subdue their weaker neighbours. It was quite true. The states

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England, did, under the colour of friendship and alliance, or confederacie, with innumerable oppressions, infest us, who minded no fraud or deceit, at a time when we were without a king or head, and when the people were unacquainted with warres and invasions. It is impossible for any whose own experience hath not informed him to describe, or fully to understand, the injuries, blood, and violence, the depredations and fire, the imprisonments of prelates, the burning, slaughter, and robbrie committed upon holy persons and religious houses, and a vast multitude of other barbarities, which that king execute on this people, without sparing of any sex or age, religion or order of men whatsoever.

"But at length it pleased God, who only can heal after wounds, to restore us to libertie from these innumerable calamities, by our most serene Prince King and Lord Robert, who, for the delivering of his people and his own rightful inheritance from the enemies' hand, did, like another Josua or Maccabeus, most chearfully undergo all manner of toyle, fatigue, hardship, and hazard. The Divine Providence, the right of succession by the laws and customs of the kingdom (which we will defend till death), and the due and lawfull consent and assent of all the people, made him our king and prince. To him we are obliged and resolved to adhere in all things, both upon the account of his right and his own merit, as being the person who hath restored the people's safety, in defence of their liberties. But, after all, if this prince shall leave these principles he hath so nobly pursued, and consent that we or our kingdom be subjected to the king or people of England, we will immediately endeavour to expell him as our enemy, and as the subverter both of his own and our rights, and will make another king who will defend our liberties: for so long as there shall but one hundred of us remain alive, we will never give consent to subject our selves to the dominion of the English. For it is not glory, it is not riches, neither is it honour, but it is liberty alone that we fight and contend for, which no honest man will lose but with his life.

"For these reasons, most reverend father and lord, we do, with most earnest prayers, from our bended knees and hearts, beg and entreat your Holiness, that you may be pleased, with a sincere and cordial piety, to consider that with Him whose vicar on earth you are there is no respect nor distinction of Jew nor Greek, Scots nor English, and that with a tender and fatherly eye, you may look upon the calamities and straits brought upon us and the Church of God by the English; and that you may admonish and exhort the King of England (who may well rest satisfied with his own possessions, since that kingdom of old used to be sufficient for seven or moe kings), to suffer us to live at peace in that narrow spot of Scotland, beyond which

it for himself. These acts of rapacity and cruelty are set forth, and emphasis not too strong is judiciously laid on the ruin brought by him on ecclesiastics and religious establishments. Then came the deliverer and the restorer of freedom, whose achievements for the country are acknowledged with a fervent and decorous gratitude. To him, for what he has achieved for them, the people of Scotland are bound to adhere; yet, to show that their determination not to submit to England predominates over every other feeling, they assure the Pope that if their beloved king were to submit to the supremacy of the King of England, they would cast him forth and choose another ruler; for so long as a hundred of them remain alive they are determined not to be subject to the King of England. By all the considerations of love and mercy that should influence the head of Christianity, his Holiness is besought to interpose and move the heart of the King of England to leave the Scots to the enjoyment of their liberties in their own remote and obscure corner of the world. The concluding sentences draw persuasive arguments out of matter which had been giving much trouble and uneasiness to the Court of Rome—the degeneracy of zeal among Christian princes for the defence of the Holy Land against the Saracens. The Scots nation were willing to join in the good cause, but they could not while a powerful neighbour's aggressions bound them to the defence of their homes and liberties.<sup>1</sup>

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<sup>1</sup> No abridgment can convey a fair notion of this memorable document: indeed, much of its power and terseness is lost in translation from the Latin original. Among such translations as the Author has noticed, the most spirited was printed at the time of the Revolution of 1688, and reprinted in 1820 in the collection called *Miscellanea Scotica*. It is more spirited than the others, because, instead of attempting to retain the terseness of the Latin, it expands into tolerably idiomatic English. The following is the essential part—that which follows on the short exordium about the antiquity of Scotland:—

“Upon the weighty consideration of these things, our most holy fathers, your predecessors, did with many great and singular favours and privileges, fence and secure this kingdom and people, as being the peculiar charge and care of the brother of St Peter; so that our nation hath hitherto lived in freedom and quietness under their protection, till the magnificent King Edward, father to the present King of

Papal Court; the character of that effect, as it may be gathered from the documents that followed, might be pronounced astounding. The fulminations against Scotland at once stopped, but those which had gone forth were not immediately revoked. An admonitory bull, dated at the end of July, was addressed to King Edward. It did not show acquaintance with the nature of the dispute on either side. It exhorted the king to consider whether, after all, it would not be better to come to some terms with the governor of the kingdom of Scotland. These wars, it was said, created sad misery and devastation, and it was ever uncertain how they might end; and there was the cause of the Holy Land neglected and the Paynim unchecked, while the potentates of Christian Europe were brawling among each other.<sup>1</sup> Presently afterwards the Pope writes to say that two commissioners and ambassadors were pleading the cause of the Scots before him—Edward de Mambuisson and Adam de Gordon. They prayed for the

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Strathearn; Malcolm, Earl of Lennox; William, Earl of Ross; Magnus, Earl of Caithness and Orkney; William, Earl of Sutherland; Walter, the Steward of Scotland; William de Soulis, Butler of Scotland; James, Lord of Douglas; Roger de Mowbray; David, Lord of Brechin; David de Graham; Ingleram d'Umfraville; John of Menteith, Custos of the Comitatus of Menteith; Alexander Fraser; Gilbert de Hay, Constable of Scotland; Robert de Keith, Marishal of Scotland; Henry de St Clair, John de Graham, David de Lyndesay, William Oliphant, Patrick de Graham, John de Fendon, William de Abernethy, David de Wemyss, William de Montfitchet, Fergus de Ardrossan, Eustace de Maxwell, William de Ramsay, William de Monte Alto, Allan de Murray, Donald Campbell, John Cambroun, Reginald le Cheyne, Alexander de Seton, Andrew de Lascelyne, and Alexander de Straton.

In the hall of the General Register House for Scotland may be seen the duplicate of this address to the Pope, which was preserved at home. It is worn and a little decayed, but has been preserved on the whole with such pious care that few words are illegible. Many of the seals still dangling to it show clear impressions in their green or red wax. It was engraved by Anderson for his *Diplomata*, and printed by Sir George Mackenzie in his tract on *Precedence*. A facsimile of the parchment, seals and all, is contained in the first volume of the *Scots Acts*; another is in the second part of the *Collection of Chronicles and Records* edited under the auspices of the Lord Clerk Register.

<sup>1</sup> *Fœdera* (Record edition), ii. 431.

that were to be the great powers of Europe were then in rapid growth, and the food on which they grew was the small, separate, feeble states scattered round them.

The Scots memorial had an immediate effect at the

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we have no habitation, since we desire nothing but our own, and we, on our part, as farr as we are able, with respect to our own condition, shall effectually agree to him in everything that may procure our quiet.

"It is your concernment, most holy father, to interpose in this, when you see how far the violence and barbaritie of the Pagans is let loose to rage against Christendom for punishing of the sins of the Christians, and how much they dayly encroach upon the Christian territories. And it is your interest to notice, that there be no ground given for reflecting on your memory, if you should suffer any part of the Church to come under a scandal or ecclipse (which we pray God may prevent) during your times.

"Let it therefore please your Holiness to exhort the Christian princes not to make the warres between them and their neighbours a pretext for not going to the relief of the Holy Land, since that is not the true cause of the impediment; the truer ground of it is, that they have a much nearer prospect of advantage, and far less opposition, in the subduing of their weaker neighbours. And God (who is ignorant of nothing) knows with how much chearfulness both our king and we would goe thither, if the King of England would leave us in peace, and we doe hereby testifie and declare it to the Vicar of Christ, and to all Christendom.

"But, if your Holyness shall be too credulous of the English misrepresentations, and not give firm credit to what we have said, nor desist to favour the English, to our destruction, wee must believe that the Most High will lay to your charge all the blood, loss of souls, and other calamities that shall follow on either hand betwixt us and them.

"Your Holiness, in granting our just desires, will oblige us in every case, where our duty shall require it, to endeavour your satisfaction, as becomes the obedient sons of the Vicar of Christ.

"We commit the defence of our cause to Him who is the Sovereigne King and Judge, we cast the burden of our cares upon Him, and hope for such an issue as may give strength and courage to us, and bring our enemies to nothing. The most high God long preserve your serenity and Holyness to his holy Church."—*Miscellanea Scotica*, iii. 125-128.

This is entirely a lay document, and for some special reason the clergy are not mentioned as concurring in it as they concurred in the other legislative acts and national state papers of the day. It is in the name of the barons, the free tenants, and the whole community of Scotland; but the names of the most eminent barons are given—and the list is valuable, as giving us the avowed heads of the national party at that time. They are—Duncan, Earl of Fife; Randolph, Earl of Moray; Patrick de Dunbar, Earl of March; Malice, Earl of



About this time the English Government seem to have become awake to a very alarming feature bearing on their dispute with Scotland. It would naturally be supposed that the sufferings of the northern counties from the ceaseless incursions of the Scots would embitter the inhabitants and their leaders against the enemies of their king. On the contrary, a feeling seems to have arisen that the King of England was unable to protect them, and that the King of Scots might be a more desirable master. There had been of old much community of feeling between these northern districts and their neighbours of the Lothians, and the traditions that they had formerly been one community were probably still alive. Through the course of the war occasional instances turn up where persons of influence in the old disputed districts are found on the side of the Scots.<sup>1</sup>

In occasional letters of Remission, in which Edward II. offered to receive into his peace all those of the Scots nation who might proffer their allegiance to him, it was specially stipulated that the privilege was not to extend to such native-born inhabitants of England as had taken part against him.<sup>2</sup>

In January 1323 King Edward wrote to Hartcla, Earl of Carlisle, the Warden of the Marches, stating his astonishment at hearing that the earls, barons, and knights of the northern counties had been adjusting on their own account a truce with the Scots, enemies of the crown, and severely rating his warden—whom he suspected not to be ignorant of this affair—for not having at once informed his sovereign of it.<sup>3</sup> The person, indeed, whom he thus addressed, was deeply implicated in the secret treaty. When Lancaster was strengthening himself against the king, he was in correspondence with Randolph and other leaders of the Scots; and it is pretty clear that his object

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<sup>1</sup> "In 1319 Thomas Gray was, for good services against the Scots, gifted with certain lands in Howick, near Alnwick, forfeited by reason of their owner, John Maitland, having joined the Scots."—Introduction to Scalacronica, xix., xx. See the instance of De Ros above, p. 197, note.

<sup>2</sup> *Fœdera* (Record edition), ii. 440.

<sup>3</sup> *Ibid.*, ii. 502.



The Scots chroniclers charge the retreating army with the destruction of the Abbeys of Holyrood and Melrose, and the Monastery of Dryburgh.<sup>1</sup>

The Scots army was on this occasion able to do what Wallace had intended—hang on the heels of the fugitives, and harass them in every shape. Here was another of those marauding invasions of the north of England, so numerous that it is difficult to remember their order of succession. The inhabitants seem to have taken example from Scots practice, and to have learned to drive their cattle southward. This is attested by royal warrants to the Sheriff of York and his assistants, directing them to see that the animals are hospitably received within their jurisdiction.<sup>2</sup>

King Edward was resting in Billand Abbey when the alarm came that the Scots were upon him. Luckily for himself he did not trust his safety to his own camp, strongly posted in the neighbourhood, but took flight, pursued by the Steward at the head of five hundred men, until he got safe within the gates of York. The Scots were in good force under their king and Randolph, and they determined to drive the enemy from their position on a rocky eminence; these might be called an army in a fortified camp, but were in truth rather a body of dispirited refugees seeking safety. They were dislodged by small parties climbing up into the broken ground which protected them, and it is said that in this duty King Robert got good service from some of the "Irishry" of Argyle and the Isles, who formed part of his army.<sup>3</sup> So dislodged from their strength, they were dispersed, with loss in killed and captives.

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<sup>1</sup> Scotichron., xii. 4. About this period we may take Bower as an authority, making allowance for his prejudice against England. He cannot be quite correct in saying that Dryburgh was entirely reduced to powder, since part of the building yet remaining is of an older date than the invasion.

<sup>2</sup> There are two of these contemporary with the Scots inroads before and after the English invasion.—*Fœdera* (Record edition), ii. 490, 496.

<sup>3</sup> Barbour, cxxxvi.

the promotion of internal peace in the two countries the prospect of each being free to promote the crusades. King Robert, too, is to found a monastery for the souls of those slain in the war.<sup>1</sup> From the tenor of all that is known of this affair, and especially from the number and power of those embarked in it, and their distinct animosity to the King of England, it may be inferred that, had the peace not been speedily concluded, the negotiations would have opened the question of stretching the marches of Scotland to the Humber.

It is in harmony with this strange piece of by-play in the history of the war, that in the ensuing negotiations King Robert put in a claim of dominion over the old debated land north of the Humber. If this was done merely as a threat, to weigh against the determination on the other side not to acknowledge the independent sovereignty of Scotland, it would have all the more weight that things had occurred to render the fulfilment of such a demand not utterly chimerical.

Such considerations, taking weight from the warlike spirit of the Scots and their continued success, pressed urgently on the Government of England the establishment of a permanent peace, and the question what should be given for it was solemnly discussed in a great council. The great difficulty was the acknowledgment of independence. Apart from the general desire of every party in diplomacy to give as little and take as much as possible, it was natural that England should try to keep the name at least of the great conquest to the very last. But it was a point on which the other party were absolute in their general demand, and sensitive to everything that appeared evasive. King Robert put into the conferences an angry remonstrance against a form of truce, in which the people

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<sup>1</sup> *Concordatio facta inter Anglicos et Scotos* 3d January 1322-23, communicated by Professor Munch, *Proc. Ant. Scot.*, iii. 454. This critical document seems to have been negotiated at Lochmaben. Its phraseology leaves room to doubt how far King Robert was acquainted with the transaction. He undertakes "per nobilem virum Thomam Ranulphi comitem Moraviæ dominum vallis Anandiæ et Manniæ nepotem dicti Regis Scociæ."

was to gain the northern barons to himself by an arrangement which would exempt them from these devastating inroads of the Scots.<sup>1</sup> Lancaster was defeated and executed, and as a reward for effective aid in this service, Hartcla was received into royal favour, became Earl of Carlisle, and was intrusted with the onerous duty of guarding the marches. Whatever mystery may attend Lancaster's movements, it is clear that Hartcla went decidedly into the project of the northern barons for a separate understanding with Scotland. The letter just cited was addressed to him while he was believed to have concealed what he should have told. We next find a proclamation for Hartcla's capture as a traitor. He was seized, and charged with employing the influence he had acquired through the high offices of trust conferred on him, in treating with the king's enemies of Scotland; and he was executed after the usual manner of a traitor in England.<sup>2</sup>

The evidence that he had worked for such a fate is aided by incidental testimony. There exists in the library of the Vatican a parchment, professing to be a treaty between the Government of Scotland on the one side, and Hartcla and his followers on the other. It gives King Robert his full title.<sup>3</sup> The professed object is to put an end to the invasions of Scotland by England, and to the devastations of the northern counties by the Scots. To this end the King of Scots is to lead an army into England. When he has crossed the border, he is not only to spare Hartcla and his followers, protecting their lands as if they were part of his own dominions of Scotland, but he is to co-operate with them as represented by their leader. For the adjustment of any disputed points a council of twelve is to be chosen—six by the King of Scots, and six by the other party to the treaty. In the preamble of motives usual to such agreements, there stands along with

<sup>1</sup> Proceedings against the Earl of Lancaster, State Trials, i. 44.

<sup>2</sup> *Fœdera* (Record edition), ii. 504, 507, 509.

<sup>3</sup> *Inter serenissimum principem dominum Robertum Dei gracia regem Scotorum, illustrem et magnificum virum dominum Andream de Arcla comitem Karleoli super pacis reformatione inter regna predicta.*—*Tractatus Proc. Antiq. Scot.*, iii. 458.



The state of the succession to the crown in France gave ground for apprehension, should there be an ambitious king of England of the Plantagenist race, and the great object of the Treaty of Cerbeil, as it was called, was to make common cause against England. Certain stipulations are mutual. Any peace between France and England ceases if there is war between England and Scotland, and so of any peace between England and Scotland should there be war between France and England. But besides these negative conditions, as they may be called, there was one positive condition laid on the Scots side alone—whenever England and France are at war, then is the King of Scotland to invade England with all his might.<sup>1</sup>

In 1327 came that tragic revolution in England which placed the boy Edward III. on the throne. It was the custom then for new monarchs to renew the obligations of their predecessors; and a renewal of the truce was offered in the name of Edward III., but it was in the old offensive shape—in favour of Robert Bruce and his adherents. At the same time authority was given in the same terms to treat for a final peace. The English records show several documents, after the signing of the truce, to the same effect. It is difficult to see how, having obtained a truce or peace for thirteen years, England should be so desirous to obtain a final and lasting peace, and yet should ask for it in terms which she knew would preclude the Scots from treating.<sup>2</sup> The whole affair suggests a suspicion that the object was to obliterate or neutralise the effect of any document in which Bruce stood on record as King of Scots. Other things tended with this to irritate the Scots.

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<sup>1</sup> *Memoirs of the Ancient Alliance between France and England*, Reprint, 1820. It is perhaps to be regretted that we have no better authority than this collection for the express terms of the treaty, but they are in conformity with the general tenor of French treaties, and with the stipulation in the Treaty of Northampton, which, in binding the Scots to peace with England, exempts them from the obligation when the terms of the alliance with France require them to be at war. A copy of the treaty is referred to in Robertson's *Index to the Characters*, p. 106.

<sup>2</sup> *Fœdera* (Record edition), ii. 561, 576, 577.

earnest desire of his uncle, the King of Scots, to join King Philip of France in an expedition to the Holy Land—and indeed, even if Philip of France should not carry out his intention, to send a Scots expedition, headed either by himself or by his nephew, then propounding the matter to the Pope. To this it was answered, that such an expedition would not be seemly while his uncle continued at enmity with the King of England and unreconciled to Holy Church, and his Holiness could do nothing to further it. Here the matter seems to have come to the desired point. Randolph explained that there was no man more devoted and dutiful to Holy Church than his uncle. He was desirous to do whatever was required of him to show his duty and obedience, if he knew how. But, unfortunately, he had hitherto been prevented by technical mistakes from knowing the pleasure of the Holy Father regarding him. Once knowing it, Randolph gave assurance that he would be found a thoroughly dutiful son. And to make it known to him there was a simple method—address future exhortatory letters to him by the title of King. The Pope admitted that he consented to this; and it was to explain, and indeed virtually to apologise for, such consent that he wrote so fully to King Edward. The missive ends with some mumbling arguments, to show that no harm could really be done to King Edward. Edward, however, remonstrated angrily against this easy way of treating a vital question. On the whole, the impression left by the Pope's account is, that the rough Scots soldier had overreached him in diplomatic subtlety.<sup>1</sup>

The next event of moment bearing on the position and external relations of Scotland is the conclusion of a treaty with France. It was negotiated by Randolph, with the assistance of the Earl Marshal and three churchmen.

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<sup>1</sup> *Fœdera* (Record edition), ii. 541: "*Bulla Papæ de colloquio inter ipsum et comitem de Murref et super titulo 'Regis' in literis ad Robertum de Brus scribendis.*" If this bull be entered of its proper date, it is difficult to understand how it should not have come up in the course of the dialogue that a peace with England had then been established upwards of half a year. For Edward's remonstrance, see *Fœdera*, ii. 549.

oatmeal bannock, as the Scots of the north do still. Their food they picked up as they went—sometimes more than they needed; but when it was scant, their hardy training kept them still fit for duty; and so they swept the country, plundering and burning.<sup>1</sup> Froissart makes up the number of this army to twenty-four thousand. His enumeration of the English force mounts to sixty-two thousand. “It was said that there were eight thousand men-at-arms, knights and esquires, and thirty thousand men armed and equipped, half of whom were mounted on small hackneys; the other half were countrymen on foot, sent by the towns and paid by them. There were also twenty-four thousand archers on foot, beside all the crew of followers of the army.” So they marched onwards from York, where they mustered—a noble army, fit for great achievements, could they have but found an enemy to fight with. As they went, the distant flames and smoke from burnt homesteads and villages showed them the track of the enemy, but to come face to face with them was impracticable. But they

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<sup>1</sup> “They bring no carriages with them, on account of the mountains they have to pass in Northumberland; neither do they carry with them any provisions of bread or wine; for their habits of sobriety are such, in time of war, that they will live for a long time on flesh half sodden, without bread, and drink the river-water without wine. They have, therefore, no occasion for pots or pans, for they dress the flesh of their cattle in the skins, after they have taken them off: and being sure to find plenty of them in the country which they invade, they carry none with them. Under the flaps of his saddle each man carries a broad plate of metal; behind the saddle, a little bag of oatmeal: when they have eaten too much of the sodden flesh, and their stomach appears weak and empty, they place this plate over the fire, mix with water their oatmeal, and when the plate is heated, they put a little of the paste upon it, and make a thin cake, like a cracknel or biscuit, which they eat to warm their stomachs: it is therefore no wonder that they perform a longer day’s march than other soldiers. In this manner the Scots entered England, destroying and burning everything as they passed. They seized more cattle than they knew what to do with. Their army consisted of 4000 men-at-arms, knights and esquires, well mounted; besides, 20,000 men, bold and hardy, armed after the manner of their country, and mounted upon little hackneys that are never tied up or dressed, but turned, immediately after the day’s march, to pasture on the heath or in the fields.”—Froissart’s *Chronicles of England, France, &c.*, i. 18.





stream—the Wear—in front. It was hopeless to assail them.

The English now tried a plan peculiar to the fashionable notions of the period. They put it to the chivalrous feeling of the Scots, whether they would abandon their advantages and have a fair stand-up fight. Either the English would move backwards, and give the Scots an opportunity of coming over to their side; or, if the Scots would courteously give them an opportunity, the English would go over to their side and fight them. Such concessions were not uncommon, and were much admired as a high development of the spirit of chivalry. But the Scots had too serious a stake in hand to sell it for such empty distinctions. They gave a rather scornful refusal to either alternative. There they were, who had invaded the dominions of the King of England, plundering and destroying at their will; and if they had in this offended him, let him come and punish them.

The English were still half-starved, while the Scots, who could better have stood such a fate, were well stocked with English-fed beef and mutton. They seem to have tried to aggravate the contrast by extravagant pretences at roistering joviality, and indulged, as the foreign historian says, in "such a blasting and noise with their horns, that it seemed as if all the great devils from hell had come there." The English plan was now a blockade to starve them out. On the morning of the fourth day after their arrival the English could scarcely credit their eyes when they beheld the crowded rock of yesterday untenanted. The Scots had moved off to other ground of the same kind, which suited them better, as it gave them communications in the rear through marshy ground, which they could easily defend.

The blockade recommenced, but the English army was not allowed to be entirely inactive. On the first night a cry arose in camp that the Black Douglas was upon them. He had swept round from a distance with some two hundred followers, on a small episodical raid, not without some hope, it was thought, of kidnapping the young king; but he had to retreat without that prize, after doing a

soon lost sight even of such distant traces of their nimble enemy, as they moved in heavy marching order, with all the camp apparel. It was resolved, therefore, to adopt, as far as possible, the device of the enemy, and follow them unencumbered. It was in an evil moment that this plan was formed. It was taken for granted that the Scots must re-pass a ford of the Tyne by which they had passed southwards, so the English army crossed that ford, and formed on the northern side, to attack the Scots as they recrossed. It was not then their intention, however, to cross; in fact, they were away southward at their work of pillage. For a whole week did the English army wait at that ford, and the miseries they suffered—a large army in their own country—are such as one only hears of in accounts of poor fugitives in a strange land, surrounded by enemies. They seem to have had difficulty in finding out where they were, until they learned that they were about half-way between Carlisle and Newcastle, with no nearer place whence they could draw supplies. For the first three days they could get little or no food; during the other four they drew a scanty supply by distant foraging. Then it rained day after day, as it is apt to do in that region, and, uncovered as they were, everything about them was soaked, and the very leather of their accoutrements rotted. This inaction and suffering became intolerable, and the army crossed back over the river, and resumed a march as vague and purposeless as its watching had been. A proclamation was issued in the king's name, offering knighthood and an estate of a hundred a-year to him who could tell where the Scots army was. After four more weary days' march a horseman came galloping to the camp to claim the reward. He had found the Scots, and had been taken prisoner by them. When he told them of the reward, they sent him off to gain it, saying they had been waiting a week for the English army, and were as impatient to receive them as they could be to attack—and now they were but three leagues off. The joy attending this information was somewhat damped when the army came up to the enemy. These were posted on a ridge of strong rocky ground, with a rapid

# TREATY OF NORTHAMPTON, 1328. 303

was time at last to treat on such terms as the Scots would listen to. A truce was adjusted in the mean time. Next, at a Parliament held at York in January 1328, a document was prepared and issued in the king's name, acknowledging the independent sovereignty of Scotland. It is discursive in solemnities, as such documents were in use to be, but in the essentials it is quite clear. The King of England declares for himself and his heirs, that the kingdom of Scotland shall remain for ever to the great prince, Lord Robert, by the grace of God illustrious King of Scotland, and to his heirs and successors; and that Scotland, by its old marches in the days of King Alexander, shall be separated from the kingdom of England, and free of all claim of subjection or vassalage, while all writings or obligations inconsistent with this independence are to be cancelled.<sup>1</sup>

It was but putting the transaction into proper diplomatic shape, that all objection to the independent position of one party should be abandoned by the other, in order that they might treat on terms of equality. The treaty which followed on this resolution by Parliament was concluded at Edinburgh on the 17th of March. It was ratified by the Parliament of England at Northampton in April, and hence is called the Treaty of Northampton.

The treaty makes provision for a royal alliance, to be afterwards mentioned—this occupies, by court etiquette, the prominent place in the record of the treaty. Next comes a promise that the two kings shall be faithful allies to each other, and live in peace and harmony, with reservation of the obligations of the King of Scots to his ally the King of France; but if, in the keeping of these obligations, the King of Scots find it necessary to make war in England, then the King of England may make war in Scotland—a stipulation which seems to be very reasonable.

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<sup>1</sup> The copy of this important state paper which has been chiefly relied on, is that preserved in the *Scotichronicon*, xiii. 12. There is a copy of it, as reported to a meeting of the Scots Estates held at Edinburgh on 17th March, in the first volume of the Scots Acts, p. 126.

good deal of mischief.<sup>1</sup> The English waited on eighteen days, expecting that famine would come to the Scots, and compel them either to submit or fight. On the last day there was reason to suppose that they were driven to the second alternative, and the expectation was matter of much serious consideration, weakened as the English army now was. From such anxiety they were relieved next morning by finding that their enemy had again disappeared. They were many miles off on their way home before they were missed. The English could hardly believe in this second evasion, until some of them cautiously crept into the camp, where they found evidence that their enemy had been as yet far from starvation.<sup>2</sup> There was nothing for it now but to let the remains of that brilliant army be dispersed. It was a sorry first experience in warfare to the heroic Edward III., and must have sadly humiliated England in the estimation of the foreign levies, were it not that these had their own share in the almost inconceivable mismanagement of the campaign.

When the expedition returned to Scotland there was immediate preparation for another against the eastern counties; and it was begun by the siege of Norham. England was suffering from debt and internal difficulties; and if such invasions were repeated, there was every chance of Scotland annexing the old debated land. It

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<sup>1</sup> Hemingford, 268.

<sup>2</sup> "Some of the English, however, mounted their horses, passed the river, and went to the mountain which the Scots had quitted, and found more than 500 large cattle, which the enemy had killed, as they were too heavy to carry with them, and too slow to follow them, and they wished not to let them fall into the hands of the English alive. They found there also more than 300 caldrons, made of leather with the hair on the outside, which were hung on the fires full of water and meat, ready for boiling. There were also upwards of 1000 spits with meat on them, prepared for roasting; and more than 10,000 pairs of old worn-out shoes, made of undressed leather, which the Scots had left there. There were found five poor English prisoners, whom the Scots had bound naked to the trees, and some of them had their legs broken; they untied them, and sent them away, and then returned to the army just as they were setting out on their march to England, by orders from the king and council."—*Froissart's Chronicles of England, France, &c.*, i. 24.

We are told that, either under separate stipulations, or in accordance with the spirit of the Treaty of Northampton, the Black Rood was restored to Scotland; and that it was intended to restore the Stone of Destiny, but the citizens of London would not permit it to be removed.<sup>1</sup> Probably they were less affected by hatred to Scotland than by a reverence for the sacred character of the relic.

While the contest with England was drawing to this conclusion, Scotland was not entirely without domestic history. A Parliament held in 1318 passed so many laws relating to special matters of order and good government, that an account of them would be as little emphatic or palatable to the reader as an abridgment of the proceedings of a modern session of Parliament. It may be mentioned as showing the progress then made in notions of internal organisation, that an Act was passed professing to accomplish an object which at the present day statute after statute seems to essay in vain—the treatment of that valuable fish, the salmon, in such manner that it may be consumed so far as, and no farther than, may be consistent with the due preservation of the breed. Another statute seems more to the purpose of its day: it is for the arming of the people, and requires that each man with ten

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that it has “the seals of the three lay plenipotentiaries still pretty entire—those of Percy and Scrope especially.” No historical position could be more preposterous than the denial, which some have thought it proper to make for the honour of England, that this treaty was ever accepted. Although it was not to be found in the old editions of the *Fœdera*, it is repeatedly referred to in documents there, and especially in some which convey pretty hard dunning for payment of instalments of the 20,000 pounds stipulated as damages for the sufferings of England. The penalty for failure to pay was, that Scotland was to be left unreleased from the heavy ecclesiastical writs out against her king and people at the Papal Court, and the reference to this alternative imparts to the demand for payment a curious mixture of the secular and the spiritual. These applications, instead of being addressed, like the documents before the treaty, to a private person, are “*Magnifico domino David Regi Scotorum illustro*,” and proceed “*magnificentiam vestram requirimus et rogamus quatenus denarios illos*,” &c. The treaty is in the Record edition of the *Fœdera*, ii. 730.

<sup>1</sup> Chron. Lanercost, 261.

All documents in the possession of the King of England containing stipulations inconsistent with the independence of Scotland are declared void, and are to be given up to the King of Scots wherever they may be found ; but if the condition by which the King of England consents to annul them becomes void, then they are to be returned. This odd stipulation is explained by other stipulations. Scotland agrees to pay to England, by three instalments, the sum of twenty thousand pounds sterling, apparently as damages for the mischief done in the recent raids across the border ; and if there is failure in the punctual payment of this money, the stipulation for cancelling the documents prejudicial to the independence of Scotland becomes void. There is another stipulation which reveals something of the position of both kingdoms as to the alien and outlying provinces. If the Irish rebel, the King of Scotland is not to help them ; and so of the inhabitants of the Scots islands, the King of England is not to aid them in war against the King of Scotland. The King of England agrees to use his good services in the withdrawal of all proceedings at the Court of Rome prejudicial to King Robert or his dominions.

There is no doubt that this treaty was eminently favourable to Scotland. It was felt as a provoking check on the opportunities which, as we shall see, afterwards opened for the resumption by England of the policy of conquest. It is treated by some of the early annalists as one of the acts of treason to the country committed by those who had the command of England at that time. Others, again, deny that it was ever accepted by England. The denial has been repeated in later times ; and it is curious to find that while so many diplomatic papers, comparatively of trifling moment, have been preserved to us among the records of England, this treaty has been dropped out of them. We have it only from the duplicate preserved in Scotland, which is, however, authenticated by the representatives of England.<sup>1</sup>

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<sup>1</sup> Scots Acts, i. 124. An abstract and account of the document is given in Robertson's Index to the Charters, p. 101. It is there stated

Another Parliament was held at Cambuskenneth in July 1326. It is remarkable as being the earliest in which the representatives of the burghal corporations are minuted as having assisted. A great tax was levied by that Parliament, and as the burgesses would have to pay their portion, so their representatives consented to it. It was for the purpose of meeting the cost of the war, and amounted to the tenth penny of all rents or profits from land. The amount was to be assessed according to the extent or valuation of Alexander III.'s time, with an exemption to lands desolated by the war. The tax was limited to the lifetime of the king. There were provisions for its being equally collected and passed into the exchequer, so that if any persons were favoured by remission of their share the grant itself should be null. The Parliament spoke of the intolerable weight of the feudal exactions, especially when they were stretched; and in consideration of their liberal grant, especially limited the power of the prerogative to the fair exaction of the established feudal dues.

It is among the events of King Robert's reign, that in the year 1320 a conspiracy against him was discovered, and those concerned in it punished. It leaves no more impression on the history of the period than mere names, yet it had a far-off source. The hero of it—the person who was to supersede the king—was a De Soulis, a descendant of that Nicholas de Soulis, the competitor for the crown, whose ancestor, Allan the Durward, had attempted, as we have seen, to get his wife legitimated as a daughter of William the Lion. Could he have effected this, her descendants would have been unquestionably the nearest heirs to the crown.

In March 1324 a son was born to King Robert by his second wife, Elizabeth, daughter of Aymer de Burgh, Earl of Ulster. This event superseded the arrangements for the succession to the throne. By the Treaty of Northampton it was provided that this infant should marry Joanna, the daughter of Edward II. of England, and there were complicated arrangements for another matrimonial alliance calculated to keep the peace between the two countries if this should fail.

pounds shall in time of war have an acton or doublet of proof, with a basnet or iron head-piece, gloves of plate, and a spear or sword. Instead of an acton and basnet he might have a habergeon or jacket, with a hood for the head, plated with iron scales.<sup>1</sup>

The great barons who held estates both in England and Scotland had by this time, either of choice or necessity, to attach themselves to the one country or to the other. The tendency of European politics at the time was to extinguish that sort of free citizenship in several states which had arisen with feudality and chivalry, and to require undivided allegiance from all the inhabitants of a state. Those who had cast their lot with England could not, of course, be permitted to retain their domains in Scotland. We do not find, however, among extant documents, such acts either of general or particular forfeiture as we might expect. Perhaps no such measure was necessary, and a short and very unnoticeable Act of the Parliament of 1318 may have accomplished the object in a shape less offensive. That Act, pleading the necessities of a country which has to defend itself by war, prohibits the removal of any commodities or money from the kingdom of Scotland. Those who lived in England could thus draw nothing from their estates.<sup>2</sup> It is easy to believe that there might be a deep policy in this. Men whose estates are solemnly forfeited are driven into a hostile position, perhaps prematurely. If no more was done against the exiles than the short Act expresses, then their position as Scots subjects was not changed; they were welcome to all its privileges, but to obtain them they must return to Scotland, and, living under the laws of the country, fight against its enemies.

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<sup>1</sup> Of the English troops of the same period Grose says (*Military Antiquities*, i. 125), "Most of these in the earlier periods were defensively armed with a kind of iron skull-cap named a bacinet, from its similarity to a basin, and a coarse leathern or linen doublet stuffed with cotton or wool, called an ackton or hoqueton, and sometimes a jack."

<sup>2</sup> "Na kyrkman of quhat sum evir condicioun or stat he be the whylk ony thyng hes within the kynrick, na zit ony lawyt man the quhillkis hes rentis or possessiounis sal presome to leid or to send gudis or rentis utouth the kynrick."—*Scots Acts*, i. 113.



The good King Robert was visibly approaching the end of his days on earth, and none can follow him to their conclusion without a feeling of satisfaction, that in the infirmities from which he could not recover he had the proud satisfaction of possessing that Treaty of Northampton—the certificate that he had recovered for his Scots people their conquered kingdom. He died at Cardross, near Dumbarton, on the 7th of June, in the year 1329.

A reign such as that of the good King Robert could not fail to leave a strong and enduring impression on the hearts of a manly and kindly people. What he had of adversity, endurance, and struggle in his early days, told for their emancipation as well as the triumphs of his later. Down to the last moment of all, the tenor of his reign was success after success, and afterwards it became all the more illustrious by contrast with the evil days that followed. For some little time after his death his name was still recalled to his faithful countrymen by stories of chivalry and romance occurring far away, yet closely associated with the memory and influence of their beloved champion. We know that, following up the dying injunctions of the hero, his heart was taken to Spain by the good Lord James of Douglas. The chroniclers further tell us how he joined Alphonso, King of Leon and Castile, then at war with the Moorish chief Osmyn of Granada; how, in a keen contest with the Moslems, Douglas flung before him the casket containing the precious relic, crying out, "Onward as thou wert wont, thou noble heart!—Douglas will follow thee!" how Douglas was slain, but how his body was recovered, and also the precious casket: and how in the end Douglas was laid with his ancestors, and the heart of Bruce deposited in the church of Melrose Abbey.<sup>1</sup>

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<sup>1</sup> A bull of the year 1330 gives Papal absolution for the extraction of the heart from the body, and its removal by Douglas in terms of his master's injunction. The story of the chronicles is that he was on his way to Palestine, but the bull shows that his original mission was to Spain, that the heart might be borne "in bello contra Saracenos."—Theiner Vetera Monumenta, 251.



had the predominant attraction. The Percies became the hereditary guardians of the north and the scourge of Scotland. Their services in the defence of the English frontier raised them, as nearly as the English constitution would admit, into such a secondary sovereignty as the Margravates of the Empire, which arose out of the influence acquired by those who could protect the frontiers from invasion. The power of the Douglasses arose in a similar manner in Scotland. Yet probably a little difference in the distribution of their estates—more to the Percies in Scotland or to the Douglasses in England—might have inverted their position, and made the Percies national to Scotland, the Douglasses to England. Another of the dispossessed lords spoken for in the English remonstrances was Henry de Beaumont. He claimed the lordship of Buchan, the same that Bruce harried after the battle of Inverury. It then belonged, as we have seen, to a branch of the Comyns, lords of Buchan and constables of Scotland; but the great English Baron Bellmont or Beaumont claimed the territory as husband of the heiress of the Comyns. Thomas, Lord Wake, is another name in the English remonstrances; he claimed the lordship of Liddel, or Liddesdale. It seems not to have been denied, on the part of Scotland, that these claims were supported by treaty stipulations; yet for some reasons, whether justified or not by events, the claimants were not put in possession of the estates demanded by them.

The Earl of Athole was one of the largest claimants among the disinherited, and the history of his house through three generations is a fair example of the fluctuations and changes in nationality among his class; for although he had a title thoroughly Scots, as Earl of Athole, he was a Norman Baron with great estates in the south of England. The house goes back, though not with a very distinct genealogy, to Donald Bane, and was one of the few of native origin which obtained an early earldom. In the middle of the thirteenth century, the Lady Fernelith was Countess of Athole in her own right. She was married to David de Hastings, who traced relationship to the royal family of England. Their daughter,

land, while the representative of the house at the time of Bruce's death naturally wished to recover them.<sup>1</sup>

Infested by such elements of discord, it is only natural to find Scotland affording a sort of brief rehearsal of the Wars of the Roses. "The disinherited barons" gathered round Edward Baliol, and, putting him in front as their king, they resolved to try their fortunes in Scotland. The Government of England acted so far with decorum, as to make proclamation on the borders against attempts to break the peace with Scotland. The barons and their leader thus found it necessary to go by sea, and they landed in Fifeshire in August 1332, to the number, as it is said, of 500 mounted men and 3000 foot. They marched onwards to Strathearn, where there was a large army under the command of Mar, the new Regent of Scotland. It was posted near Duplin, on a broad gradual slope—the kind of ground which suits great armies for manœuvring against each other for the upper ground. There seems here, however, to have been no generalship on either side. Edward Baliol was no soldier, and the force he landed with was what we have seen. Yet he attacked and routed a large army. The affair is one of the mysteries of war. That Mar's army did not choose to fight against Baliol and his supporters would be the natural solution, but for the enormous slaughter which, beyond doubt, befell the army which professed to fight for King David. Edward Baliol now fortified himself in Perth. There another large army invested him, but dispersed without doing, or indeed attempting to do, anything that a force, either with its heart in a cause, or under the orders of responsible officers, should have done. On the 24th of September 1332 he was crowned at Scone; and thenceforth for a while we find in the English records mention of Edward, by the grace of God King of Scotland.

These records contain a special item, dated 23d November 1332. It is the certificate of an acknowledgment by

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<sup>1</sup> Wood's Peerage—Angus. See an examination of the genealogical position of "the disinherited barons" in Hailes's Annals, ii. 177 *et seq.*

most extensive belonging to any English subject, and to have given the Earl of Athole claims in the counties of Norfolk, Suffolk, Essex, Hertford, Lincoln, and Northumberland. On the other hand, the fragments of our records of Scots land-rights reveal to us gifts of the Athole estates to partisans of Bruce—the great bulk of them apparently going to the family of Campbell of Lochawe, the husband of his sister Mary.

Disposals of the Comyn estates also turn up in the records, showing that, besides the great Highland lordship of Badenoch, there were at the crown's disposal fragments of property belonging to that house in Teviotdale, Clydesdale, Dumbarton, and the Lowlands of Perthshire.<sup>1</sup>

This sketch of family history may serve as a specimen of the interests which caused oscillations in allegiance sadly calamitous to Scotland. There were many other barons attached to the English Court who had claims of a like kind on Scotland. For instance, Talbot of Goderich Castle, in Hertfordshire, represented the sister of Athole's mother, the coheiress of the estates of the Comyns of Badenoch. The family of De Quincy, Earl of Winchester, had estates in the south of Scotland—one of them, Tranent in East Lothian—and we find English Mortimers and De la Zouches putting in claims which are traced to an heiress of the De Quincys. In the middle of the thirteenth century there was a Matilda, the heiress of the earldom of Angus, held seemingly by a native family; she was the daughter of Malcolm, who was the son of Duncan, and the grandson of Gilchrist. This lady married Gilbert d'Umfreville, Lord of Redesdale, Prudhoe, and Herbottill, in Northumberland, and carried her rights into his family. It was their son who, as governor of the Castle of Dundee at the opening of the War of Independence, objected to resign his command to any but the Scots Estates, who had commissioned him. The family became decidedly English, and King Robert disposed of their estates in Scot-

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<sup>1</sup> See Wood's Peerage—Athole and Badenoch; and Robertson's Index to the Charters.

English army was assembled at Newcastle in the spring of 1333. Berwick was, as formerly, to be the first object. The vast system of fortifications for which Edward I. had given the practical hint had been sedulously carried out, making indeed two great strongholds—a castle and a fortified town, each under its own governor. Again a trial was made by a ship attack from the estuary of the Tweed, but it was beaten off as before. The land siege was, however, pressed by a great army, with every siege engine of the day. The Scots meanwhile, under the guardian, tried the old game of a formidable raid into England, threatening to carry off the Queen of England from Bamborough Castle; but this great Norman fortress was too strong to be in serious danger from a light-armed flying force, and the English army was not to be diverted away from its chief object. The English force was far too powerful to be long resisted. There were treaties with the besieged, who were accused of bad faith in still holding out; but the end was, that on a given day the town and castle were to be yielded if they were not succoured, and the test of an effectual succour was to be two hundred of the Scots army actually joining the garrison of the town.

The Scots army marched out of England, and crossed the Tweed at a safe distance. They found the English posted on Halidon Hill, rising westward of the town, and now approached by rows of villas. The ground around its lower slopes was then a marsh, which strengthened the position. The Scots army were led by the new regent or guardian, Douglas, and by the Steward of Scotland, yet a youth. There were some of the old tried captains of Bruce's wars present, but in inferior posts. Here the conditions of Bannockburn were almost inverted. The Scots, if they would fight the English, must attack them on their own ground. The assailants on foot were struggling through the morass, where they were exposed to the deadly skill of that department of the English army which was ever becoming more formidable—the bowmen. There was no possibility of dispersing them with cavalry, and the Scots army, ere it reached the English, was but an attenuated fragment of itself, easily dealt with. There was no escape from an exterminating slaughter, and the

King Edward of vassalage to the King of England for his fief of Scotland. It is, like the documents connected with Edward I.'s feudal claim, saturated with forms and technicalities, as if the skill of the scribe who drafted it could make it perpetual. It tells how Edward's father had been invested with the crown of Scotland by the lord superior; how he had committed offences wherethrough it was justly forfeited to the superior; and how a usurper had in the mean time come in and held the fief by force. As the father whom Edward represented had forfeited his fief by his misdeeds against his superior, his son could not succeed to the fief unless he were accepted as a vassal by the King of England; and this being done, the infeudation of Scotland was again as complete as parchment could make it.<sup>1</sup> There is no reason to presume that the people of Scotland knew anything about the notarial docket of this transaction, or had any notice that there had come a great revolution in their condition as a nation. Nearly at the same time King David was removed out of the way of the contest, and hospitably received at the Court of Paris.

The events that follow cannot be grouped and distinguished like those of a war with two sides having a question of nationality or of principle to divide them. It was not even the simple question between dynasties; with this there were mixed up considerations of person, connection, and property all over the country, and the quarrelling is intermixed like the personal contests in an excited mob. At one time we find the new king overmastered by numbers near Annan in Dumfriesshire, fleeing half naked across the English border for protection. Then there are raids across the border, and England, which professed to let the contest in Scotland work its own way, now finds that the Peace of Northampton has been broken by the Scots. It was determined to punish the aggression, and give substantial aid to the new king. This gives for a time distinctness to events—it is again England and Scotland measuring swords. The usual summonses and commissions were issued, and a great

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<sup>1</sup> See the documents in *Fœdera*, ii. 847.

are entered as present in that Parliament seven bishops. These are followed by four names representing the barons; one of them thoroughly belongs to Scotland—Patrick of Dunbar, Lord March, the governor of the Castle of Berwick at the time of the capitulation. The other three are thoroughly English—Athole and Bellmont, whose family history we have seen, and Richard Talbot, taking the title of Earl of Mar, bestowed on him no doubt by Edward Baliol. Then it is set forth that there were present many barons, magnates, and other persons of the kingdom of Scotland, clerical and lay.<sup>1</sup> The proceedings, like those before King Edward I. in his court of Lord Superior, are drawn up and attested by a notary of the Empire. The whole is as unlike an Act of the Parliament of Scotland as it could well be. It wants that "excellent brevity" which Bacon found in the old Scots Acts. At every stage, whether of preliminary, ceremonial, or of actual business, it is protested in a profusion of words that what is done has been deliberately weighed and considered, and has without doubt received the assent of all and singular, the bishops, prelates, earls, magnates, and men of Scotland assembled on the occasion listening and giving their assent thereto, and no one gainsaying. Through these profuse formalities two transactions are traceable. The one is a declaration of King Edward Baliol's homage and fealty for Scotland to King Edward of England; it was evidently desirable that this should be on record, not merely in the personal name of the vassal, but as a condition admitted by a free Scots Parliament numerous attended. The other transaction was the conferring of a testimonial or reward on the King of England for his services in helping the true heir of the crown of Scotland to recover his fief. The form of the reward was a rent-charge of two thousand *libratæ*, to be made good on land in Scotland.<sup>2</sup> By way

<sup>1</sup> "Et aliis quamplurimis baronibus, magnatibus, proceribus et hominibus tam clericis quam laicis dicti regni Scotiæ."

<sup>2</sup> It has been much disputed whether this word means a sum of money secured on land, or a certain acreage of land pledged. See Ducange, "*Libra; Librata.*" The author of '*Les Termes de la Laye*,' says *Librata Terræ* contains four oxgangs; and he says, on



warlike renown of England almost recovered at Halidon Hill what it had lost at Bannockburn.

Berwick had to yield. Though afterwards repeatedly changing hands, the town never remained so long in the possession of Scotland as to be more to the country than a military post of the enemy held for a time and then retaken. Hence, from the day of Halidon Hill, Berwick was virtually the one permanent acquisition to England by the great war, unless we may include the Isle of Man. This, the farthest south of the groups of islands which held but a light and fluctuating allegiance to the crown of Scotland, was occupied and retained by England. Allusion has already been made to the trouble given for centuries to English legislators and men of business by this acquisition of Berwick, after the boundaries of England had been long adjusted. In mere topography Berwick held rank as a respectable market-town with a small foreign trade. But owing to its eventful career, the place was long burdened with an official staff, which, in its nomenclature at least, was pompous as that of a sovereign state. The English Government, after Scotland was lost, retained the official staff which Edward I. had designed for the administration of the country. It was huddled together within Berwick as a centre, and was in readiness to expand over such districts of southern Scotland as England acquired from time to time—was ready to spread over the whole country when the proper time should come. Soon after the recapture of Berwick, as we shall see, there was a prospect of such expansion. The active field for this body, however, was contracted by degrees, and at last it was confined to the town and liberties of Berwick, which were thus honoured by the possession of a Lord Chancellor, a Lord Chamberlain, and other high officers; while the district had its own Domesday Book and other records adapted to a sovereignty on the model of the kingdom of England.

Soon after this victory, in the beginning of the year 1334, came transactions which appear on the English records as the Acts of a Parliament held at Edinburgh, but they have no place in the records of Scotland. There

sions among the disinherited lords themselves, owing to disappointed expectations and unexpected directions taken in the awarding of the territories ever changing hands. Thus the English Beaumont goes in discontent to his Castle of Dundarg, on a rock on the coast of Buchan, and holds it for family reasons against Baliol's party while it is besieged by Mowbray, who afterwards, aggrieved by his usage in the distribution of prizes, joins the national party in Scotland. Throughout the whole confusion of contest for personal interests, this national party—the middle class and general population of Scotland in fact—were the real substantial power available for fighting purposes. If these at the beginning looked on the contest as turning on a mere question of succession to the throne and to certain baronies, later events showed them that what was at issue was the other and vital question of national independence or subjugation to England. Repeated aid to Baliol's cause came from England, and Edward himself invaded Scotland as far as Aberdeen, the people pursuing their old policy of scattering with their belongings as he approached. But he did not pursue this purpose with the earnestness of his grandfather, or his own in other contests. We can see, even in the confusion of this war in Scotland, the influence of another and grander field of enterprise having opened on the ambitious spirit of this young king.

There was now close intercourse between the national party in Scotland and the Court of Paris—a name conveying a more distinct impression than “the Court of France,” since a great part of present France, then distributed into secondary sovereignties, with no more than a feudal connection with the central government, pursued a separate policy, and in a great measure supported the English invasion there. The internal politics of France have a close connection at this period with the destinies of Scotland; and it may be well, for the sake of clearness, to recall the position of the influencing forces there, however familiar they may be to the reader.

When Louis X. died in 1328, he left daughters, but no son. The old code called the Salic law—which is now

of giving effect to this obligation, the town and territory of Berwick are made over to the King of England. So much for the business professed to be accomplished by an Act of Parliament.<sup>1</sup>

There followed presently a supplement to the transaction, in which King Edward Baliol acted alone by charter, without professing parliamentary sanction. It was the fulfilment of the gift of two thousand libratae of land. Berwick alone was insufficient as a security to cover that amount, and therefore, in addition, the King of England was to have possession of the town, castle, and county of Roxburgh, of the town, castle, and forest of Jedburgh, and in the same manner, with their towns and castles, of the counties of the Lothians, Peebles, and Dumfries. It was, in the shape of a mortgage for a debt, a gift to England of the districts south of the Forth.<sup>2</sup> The shape of this transaction reminds one of the English fictions of law, now obsolete, by which entails were docked, or questionable titles to land rectified, by common recoveries, or other actions by fictitious personages.

Absolute sovereignty over the most accessible part of the country—a sworn vassal ruling over the rest—the hold of England upon Scotland was of a far more likely kind than Edward I.'s notion of absolute conquest, had the arrangement gone further than writing and sealing. The English Government proceeded immediately to make good its position by establishing an English official organisation in the newly-acquired territory.

For three years after this the fighting continued, and was of the same chaotic character. There were even divi-

the authority of the Scots author Skene, in his 'De Verborum Significatione,' that an oxgang consists of thirteen acres. What Skene says, under the head of Bovata Terræ, is, "Some land is mair fertile and uthir mair barren—alwaies ane oxengate of land suld contene threttene acker."

<sup>1</sup> See the whole record in *Fœdera* (Record edition), ii. 876. Besides all manner of attestations and certificates, the notary particularly identifies the record as having the great seal in green wax appended to it by ribbons partly green and partly yellow.

<sup>2</sup> *Fœdera* (Record edition), ii. 888.

the weight of the English power. King Edward, indeed, was in apprehension that France might anticipate him by sending a force into Scotland, and giving him work at home. At last, in the autumn of 1339, to the joy of the national party in Scotland, it became known that a force had set sail from England to invade France. Like the death of Edward I., here again was a turning-point in the chances for Scotland. Whether as the sole object of ambition to two such potent spirits as Edward III. and the Black Prince, Scotland could have held her own to the end, may be doubtful. It is certain that the struggle, if it lasted, must have been more critical and bloody even than we have found it. With the most accessible and valuable part of Scotland almost in his hands, King Edward must have been sorely tempted ere he followed a course that compelled him to loosen this hold—we may believe that his grandfather would have selected the nearer and more promising field of enterprise.

At this time, the broken-up adherents of the national party had so far concentrated as to be under general leadership. Their first head was Andrew Murray of Bothwell, the son of Wallace's favourite colleague. He was a tried warrior, and had a career second only to that of his old master, Bruce, in personal hardship and adventure. He was chosen regent soon after the battle of Duplin. In 1335 he gained a considerable battle at Culbleen, on the slopes of the higher Grampians, in the west of Aberdeenshire. The leader of his opponents was that Earl of Athole who has been spoken of as one of the great barons who really belonged by birth and education to England, though they had claims in Scotland. He met in the battle of Culbleen a heroic death; and the chronicler Wyntoun describes how, when deserted by the flight of his followers, he set his back to a rock, and said it should take flight as soon as he. Murray harassed King Edward in his march northwards in the following year. In 1328 he died, and the Steward of Scotland, then twenty-two years old, succeeded him as regent. There was then again gradually emerging out of the recent chaos a visible Scotland to be governed. The Steward's high

supposed to have been intended for the internal regulation of some parts of Germany—was said to apply to the throne of France, so that no woman could reign there, and the daughters of King Louis were excluded. The uncle of King Louis, the second son of his grandfather Philip III., was Charles of Valois. He died just before the beginning of the century, leaving a son, Philip, who stepped into the throne without any opposition on behalf of the daughters of Louis, and thus, in the year 1328, founded the royal house of Valois. Isabel, the sister of Louis X., was married to Edward III. of England. In the exact rule of hereditary succession her claim would stand behind that of her brother's daughters, but the exclusion of female succession applied to her if it applied to them. It was whispered, however, that the exclusion of females was personal only in order that the throne of a warlike people should be filled by a male—it did not affect the right of priority when a male claimed it. This reasoning made Edward III. of England, the son of the late king's sister, a degree nearer to the throne than Philip, the son of the late king's uncle; and the reasoning had a tendency which inclined King Edward to give ear to it. The one thing needful to conclude the argument logically as well as practically was a sufficient force: with such an army as England alone could supply, the adventure would be imprudent. It was necessary to wait until some notable division of forces should arise out of the complicated relations between the Crown of France and the subordinate sovereignties. This opportunity arose, and made in France a considerable Plantagenet party, helping the English aspirants to the throne, down to the memorable expulsion set in motion by the Maid of Orleans.

In 1337 the diplomatic language of England no longer acknowledges "our beloved kinsman, Philip, King of France." He is changed into "Philip of Valois, conducting himself as King of France," just as at an earlier period 'David, by the grace of God King of Scots,' becomes "David de Bruce, commanding our enemies in Scotland." Even before this, the national party in Scotland had felt this counter-current setting in to relieve them of some of

position, if not his talent, gave him command ; for he had been the parliamentary heir of the crown, and would have worn it but for the birth of the nearer heir.

Early in the year 1339 Edward Baliol left Scotland—a token that the national party had made such head as to render his living there uncomfortable. He became a hanger-on at the Court of England, where he must have been a costly guest, if we are to judge from the many warrants preserved among the English records for the payment of his debts and the maintenance of his establishment. It was a further token of progress that in May 1341 King David returned from France with his queen, Johanna of England. He was but seventeen years old, yet the Regent appears to have given over to him the government.

Perhaps the best measure of the very gradual restoration of the country to itself is in the events connected with the possession of the strongholds. In the year 1337 several fortresses in the north were recovered, such as Dunnottar and Kinneff, with Falkland, in Fife. A much more important achievement was the taking, in the same year, of the Castle of Bothwell, on the Clyde. We can see from the character of the fragments still remaining that it must have been a strong fortress, then recently built after the new system of fortification. Its capture had a significance, from its place in the centre of one of the most fruitful districts of the new dominions of the King of England. On the opposite side of these dominions, and in a district still richer, stood one great fortress which had not yet fallen to the English—Dunbar. It was determined that a mighty effort should be made to take it, and siege was laid to it by a large force under the Earl of Salisbury in 1339. The governor, the Earl of March, was absent ; but his wife, a daughter of the favourite hero Randolph, immortalised herself by the resolute and indefatigable resistance headed by her. She is known in history and tradition as Black Agnes of Dunbar, a nickname given to her, as it is said, from her swarthy complexion. Helped from the sea, the fortress, under its “she-captain,” held out so stoutly, that Salisbury, with intense reluctance, withdrew his force.

Galling the gleanèd land with hot essays,  
Girding with grievous siege castles and towers,  
That England, being empty of defence,  
Hath shook and trembled at th' ill neighbourhood."

It appears to have been by desire of the French Court, and in pursuance of the alliance with France, that a serious invasion of England was at last projected. King Edward was busy with the siege of Calais in 1346, when a large Scots force assembled at Perth and marched southwards. They were under the command of King David, then twenty-two years old. He had been educated in a bad warlike school for effective service in Scots warfare. Feats of arms which had nothing to recommend them but their dashing character, headlong acts of audacity done in the spirit of gambling with the most momentous interests, had become fashionable among the chivalry of Europe, and especially in France. It was more to the spirit of rash adventure than to deficiency of prowess or courage that France owed most of her disasters; and her ally seemed to participate in the same spirit, to be led to like results.

The array of the north of England was called out under the authority of the Archbishop of York. Again the force organised was conspicuous for the number of clergy embodied in it, but this time they were in better hands than on the fatal day of the Chapter of Mitton, for the archbishop had two warlike assistants, Henry Percy and Ralph Neville. The Scots army reached the neighbourhood of Durham, where events showed that the organisation for intelligence was signally imperfect. The Knight of Liddesdale, on a foraging party, found himself face to face with the English army. The party fled, much diminished by slaughter, to the protection of their own lines. They brought their pursuers with them, and thus the Scots army were aware of the presence of the enemy in that very discouraging shape—the reception of a scattered body of fugitives. On the 17th of October 1346 the two armies fought. For the second time at least the Scots suffered terribly from that scourge for which they were unprepared—the English archers. To charge them in flank with a

Douglas gained what he wanted—the murdered man's office—and became governor of Roxburgh Castle. Afterwards a prisoner in England, he became mixed up with transactions giving grounds for inevitable suspicions that he was ready to betray the national party to King Edward. While he was yet a captive, David de Berkeley was murdered in Aberdeen; and it stands charged against Douglas in the chronicles that he hired the murderers, in revenge for a family injury.<sup>1</sup> He fulfilled the proverbial fate of the bloody and deceitful man. He had in some of his acts given deadly umbrage to his kinsman, William, Lord Douglas, at whose baptism he had stood as sponsor, and this godson murdered him as he was hunting in Ettrick Forest.<sup>2</sup>

King Edward's foreign war compelled him to submit to several truces with the Scots. These were not easily kept. It was not as of old, when crossing the border broke the truce. The southern districts of the country were half ruled by England, half by Scotland. The truces required that the Scots should abstain from molesting, not only the inhabitants of England, but the King of England's subjects in Scotland. But the very possession by the Scots of certain strongholds within the boundaries occupied by these subjects was in itself a waging of war; and as the national party waxed stronger they were not content to restrain the war within their own country, but recommenced the old raids across the border when Edward was with his army in France. As Shakespeare puts it, in the words of Henry V.—

“ The Scot,  
Who hath been still a giddy neighbour to us.  
For you shall read that my great-grandfather  
Never went with his forces into France  
But that the Scot, in his unfurnished kingdom,  
Came pouring, like the tide into a breach,  
With ample brim and fulness of his force,

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judgment on him for taking Roxburgh on Easter Day, “at the very hour of the resurrection.”—See the abstract of the lost passages in Leland, i. 558.

<sup>1</sup> Scotichron., xiv. 7.

<sup>2</sup> Ibid., xiv. 8.



the Archbishop of St Andrews, one other bishop, one knight, and many others." Among the slain, besides "many lords and Scotsmen, to the number of, one and other, fifteen thousand," are included that mystical body, "seven earls of Scotland."

The abbot has another loss to record, quite as great in his eyes—ininitely greater in its gain to the patrimony of St Cuthbert: this was the Black Rood of Scotland, so important as a national palladium that, after its removal by Edward I., it had been restored to Scotland by treaty. It was kept, as we are told, in Durham Abbey, on the pillar next St Cuthbert's shrine in the south aisle. The national banner of Scotland, and several leaders' pennons, were a fitting accompaniment to this prize.

The importance of this battle is shown in the solemnities with which it was commemorated. The prior caused make a goodly and sumptuous banner, with pipes or rings of silver, and various costly decorations. The corporax cloth was let into the centre of this banner, which was kept in a chest in the "Ferretorie," to be carried in the abbey on festival days, and especially to be displayed in battle. A cross was erected on the place where the monks assembled: a more gorgeous cross was erected on the field of battle by Sir Ralph Neville—hence the field afterwards obtained its name. It stood until the year 1589, when it was destroyed, apparently by some zealous reformers.<sup>1</sup>

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<sup>1</sup> "An antient memoriall collected forth of the best antiquaries concerning the battell at Durham in John Fossour tyme," printed in the 'Antiquities of the Abbey and Cathedral Church of Durham,' and more accurately in the 'Rites of Durham,' by the Surtees Society. The conclusion shows that the author of the memorial was alive at the time of the destruction of the cross: "which so did there stande and remayne most notorious to all passingers till of laite, in the yeare of our Lord God 1589, in the nighte tyme, the same was broken doune and defaced by some lewde and contemptuous wicked persons, thereunto encouraged as it seemed by some who loveth Christe the worse for the crosse sake, as utterly and spitefully despising all auncient ceremonies and monuments." The memorialist describes the cross with "three steps aboute yt every way, four squared to the sockett that the stalk of the cross did stand in, which sockett was mayd fast to a four squared brod stave,"—and so on, with a minuteness that becomes tiresome.

party of horse, as at Bannockburn, was the remedy. It was suggested by one of the commanders, but the suggestion was useless, as the means had not been provided, and could not be improvised. It was a complete victory to England; and what crowned the calamity for Scotland, King David was carried off a prisoner. The Steward and the Earl of March, who were next in command, drew away the remnant of the army. Froissart threw a romantic interest over this English triumph, by a story that the victorious troops were led by that gentle queen, Philippa, who interceded for the burgesses of Calais; but this has not the confirmation which so remarkable an incident would certainly have had from native authors.

This victory is connected with other legends and reminiscences, which show the importance given to it in England. It was more than a mere victory by human prowess; the intervention of the Deity was clearly visible in it. An old memorial, which relates the legends of its day, and describes some trophies of the victory, preserved at Durham, tells how, on the night before the battle, there did appear to John Fossour, then prior of the Abbey of Durham, a vision commanding him to take the holy corporax cloth wherewith St Cuthbert did cover the chalice when he used to say mass, and stick it on a spear-point as a banner, wherewith he was to take up his stand on the Red Hills, and there abide until the battle that was to be should be over. The prior gave full obedience to this injunction, "taking the same for a revelation of God's grace and mercy through the mediation of holy St Cuthbert." Standing on the Red Hills with his monks around him, all prostrate in prayer, there came crowds of the Scots running towards them, who pressed on them with evil intent, but had no power to commit violence on holy persons so occupied and protected. They witnessed, ere the battle was over, "many conflicts and warlike exploits;" but of these they give no account, deeming them a secondary matter of mere detail when weighed with the preparations for securing victory made by themselves.

The loss to the Scots is described as the capture of their king, "and with him were taken four earls, two lords,

King David was taken to the Tower of London with a train of captives. We find in the English writs of the day provision made for the detention of the bulk of these as prisoners of war waiting for ransom. These are spoken of as Scots ; but two of high rank were reserved for punishment as traitors—the Earls of Menteith and Fife. It was charged against them that they had sworn allegiance to Edward, King of Scotland, holding that fief as vassal to the King of England—a specialty repeated, as usual, at every turn of the proceedings against them. These were peculiar—a sort of compromise between the trial of an English subject and the condemnation of an alien captive, like the proceedings against Wallace. A commission was appointed for their trial, but the sentence to be pronounced on them was sent from Calais, as adjusted there by the king and his council. The sentence was death in the cruel manner of the English treason law ; on Menteith it was executed, but Fife was spared.<sup>1</sup>

The English army crossed the border, and their success gave temporary animation to Edward Baliol, who helped them. He held the Castle of Caerlaverock, memorable for its siege by Edward I. Roxburgh and Hermitage were retaken ; and England recovered for the time a hold on Tweeddale, Teviotdale, Ettrick Forest, Annandale, and Galloway—fully half of the district made over to Edward III. by Baliol.<sup>2</sup> The Steward now again became regent ; and it says much for the constitutional spirit of the times that it seems never to have been in his view, or that of his supporters, that he should be made king, though many

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<sup>1</sup> *Fœdera* (Record edition), iii. 95, 108.

<sup>2</sup> *Scotichron.* xiv. 5. Here Bower says the English marches were at Cockburnspath and Soutra at one end, and at Karlynlippis and Crosscrysne at the other. One of these points is easily identified with Carlops in the Pentlands, among the scenery of the 'Gentle Shepherd.' The site of the other point is doubtful. Macpherson, in his 'Geographical Illustrations of Scottish History,' generally a very satisfactory book of reference, deals with this question in an extremely equivocal way : "Crosscrysne," he says, "is apparently a cross on the Cairn hills ;" and on turning to the head Cairn hills to see where they are placed, the answer is, "*v.* Crosscrysne." There is a spot called Corse Cryne near Biggar, in Lanarkshire.—*Stat. Ac.*, vi. 359.

members who become personally responsible.<sup>1</sup> These documents are full of oaths and promises; of special obligations to submit to all kinds of authorities, clerical and lay, that can extract the money from them, and to take advantage of no laws or powers by which they can exempt themselves. Great pains were taken to oblige the debtors not to seek any Papal exemption from their obligations, and to reject any such exemption if it should be issued; and that this was a real risk is shown by a little incident connected with the affair. France subscribed certain gold nobles to the ransom fund, under the condition that, should the Pope exempt Scotland from the debt, the money was to be spent on an invasion of England. The Papal Court, at all events, did not help in the payment. It was a special obligation on the churchmen that they should apply for a Papal confirmation of the debt as binding on the Church, but their request to be subject to this obligation was refused. But the best security that England obtained was real and personal. Several of the chief Scots lords were named, including the Steward—three of whom must ever reside in England as hostages for the payment of the debt—along with twenty men of noble houses. Under these conditions King David returned to Scotland in the autumn of 1357.<sup>2</sup>

Throughout the tedious negotiations for his ransom, and even after he returned and reigned, he was ever called in the English documents David de Bruce, while Edward Baliol was called King of Scots, and in that capacity was heard as a party in King Edward's negotiations with "those of Scotland." Before the adjustment of David's release was accomplished, it seems to have occurred to Edward and his advisers that something might be made of Edward Baliol. He was absolutely in their hands, and must do for his very maintenance what they might please to exact. Accordingly, in all due form they extracted

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<sup>1</sup> The list of persons responsible for the burghs as given in the *Fœdera* may be compared with the many Norman-sounding names we have come across in dealing with the nobility of Scotland.

<sup>2</sup> See *Fœdera* (Record edition), iii. 365 *et seq.*

one had power to dispose of the liberties of the people. Their remedy for such a disposal of their allegiance would have been the simplest possible—the acknowledgment of the Steward as king, by a mere anticipation of what was to be on David's death. It is suggestive to note at this time a paper, which shows a sense of the spirit in which the Scots took all questions of government—that of retaining their ancient customs and liberties. A proclamation is issued, intimating that all the Scots who shall come to King Edward's peace and obedience shall enjoy the old laws, liberties, and customs enjoyed by their ancestors in the days of Alexander III.<sup>1</sup> It was now far too late in the day for such promises to have any effect—even if, coming from the King of England, they could ever have found reliance. It was in fact but a mimicry of those promises to the English people for the renewal of the charters—promises which never were kept when they could be broken.

The English Court at last found that the best they could make of their acquisition was a pecuniary speculation. There is a wearisome succession of treaties on this matter, in the course of which David was permitted to pay a visit to Scotland, giving hostages for his return. The ransom of David was at last adjusted at a hundred thousand merks, and the Estates of the Scots Parliament acknowledged this as a national debt. A nation's faith, however, was hard to bind in that age and long afterwards, and the elaborate mechanism adopted on this occasion affords a study in legal and diplomatic ingenuity. Each of the Estates—the Church, the Baronage, and the Burghage—grants a separate obligation, each binding on its own body at large, and especially on certain individual

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<sup>1</sup> "In legibus, libertatibus, et liberis consuetudinibus, quibus ipsi et eorum antecessores, tempore celebris memoriæ Alexandri, quondam Regis Scotiæ, rationabiliter uti et gaudere consueverant, &c., manuteneri et nostro nomine prout justum fuerit conservari."—*Fœdera* (Record edition), iii. 237.

Afterwards, in 1356, a similar declaration is specially made to the inhabitants of Teviotdale, spoken of as giving loyal service against the king's enemies of Scotland.—*Ibid.*, 331.

gave protection to many of the citizens; nor could the town be retained while such a neighbour remained with the enemy. Edward himself, just returned from France, appeared before it with such a force that there was no alternative but capitulation. The town was taken by the Scots in November 1355, and lost in the following January. In that short period the French force, which had done good service, was allowed—nay, it would appear, pressed—to depart. The Scots were more in need of money than of men. The French were luxurious and troublesome guests, and the Scots felt ashamed of the sordid poverty in which a long war for existence involved them. Having brought a fine army into Scotland—the chronicles say it was eighty thousand strong—King Edward was determined to do more than merely rescue Berwick. He marched onwards to the Forth. The old Scots policy for exhausting an invasion was followed up very successfully. He had no opportunity of fighting a battle, and found the country empty both of men and food. He had commissioned a fleet to import a commissariat, but the vessels were dispersed by the winter storms. It was necessary to retreat and disperse the army—a course which such a king as Edward, after the mighty preparations he had made, must have taken with extreme bitterness of disappointment. It was, perhaps, this feeling diffused through the army that rendered it extremely destructive. It left marks and recollections very inimical to the policy of King Edward, whose object was to let the Scots feel that he would make a good ruler over them. The invasion was specially noted by the mischief done to the religious houses, especially to the church of the Franciscans at Haddington, which had a place in the admiration of the country as “the Lamp of the Lothians.” This was a scandal which his grandfather would have carefully avoided.

These devastations had the effect of reversing the moral conditions of the quarrel between the two countries. From the Battle of the Standard down to that of Neville’s Cross, the English monks who chronicled events had been able to represent the cause of Scotland against England as that

from him, in 1356, an absolute gift and surrender of his crown and kingdom of Scotland to King Edward and his heirs, and livery and seisin of the transference were taken in all proper form. It is part of the spirit and practice of feudal conveyancing to set forth the consideration for any transference of power or property—absolute gifts for no reason were discountenanced. Edward Baliol gave as his reason for the transference, the turbulent nature of his Scots subjects, and their rebellious practices against, not only himself, but his Lord Superior. In a separate indenture Edward of England acknowledged the donation, and granted to the donor of it an annual pension of two thousand pounds, to be paid at stated quarterly terms. The bundle of carefully-drafted papers in which the stages of the transaction are recorded, had little chance of producing any immediate effect on the fief so given up to its lord superior. These parchments, however, might come to be of use at some after-time to the crown of England, and it was as well to have them, as they could be easily got.<sup>1</sup>

Baliol was the more thoroughly at the mercy of the King of England, that his estates in France had been forfeited as those of an enemy—a natural effect of the alliance offensive and defensive between France and Scotland.<sup>2</sup> Crippled and endangered as she was, France endeavoured to help her ally. Considerable sums of money were sent to assist the Scots. What was less needed, yet showed goodwill, a small body of men-at-arms was sent over in 1355 under the command of the Sieure Eugene de Garancier. They partook in the most important warlike affair undertaken by the Scots during their king's captivity—an attempt to recover Berwick. The town was taken and pillaged, but the castle held out and

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<sup>1</sup> See them at length in the *Fœdera* (Record edition), iii. 317 *et seq.* The designations of the parties in the preambles of the writs may be thought interesting; they are, "Tresexcellentz et Puissantz Princes Monsieur Edward, par le grace de Dieu Roi d'Engleterre et de France, d'une part, et Monsieur Edward de Baliol, Roi d'Escoce, d'autre part."

<sup>2</sup> Michel, *Les Ecosais en France*, i. 66.

of the unbeliever against the Church, especially manifested in the destruction of holy things, and the slaying of holy men within the sanctified territory of St Cuthbert. This spiritual weapon had now changed hands. The chronicles are full of the impious barbarities of the English soldiers and sailors, and the awful judgments by which they were avenged. Walter Bowmaker, for instance, narrates an incident told to him by a good and very trustworthy friend who was present and saw it happen, being twelve years old at the time. Certain English sailors invaded the church of Whitekirk, on the coast of East Lothian, where was a shrine of the Virgin endowed with costly gems. One man snatched a ring from the Virgin's image so rudely as to mutilate the finger it belonged to, when forthwith a crucifix fell from above and dashed his brains out. It was recorded that a ship laden with the spoil of this and other sacred places was attacked by a vehement tempest and foundered off Tynemouth.<sup>1</sup>

Though the English expedition fell far short of any success adequate to its pretensions, yet it appears to have regained a great part of that southern district which Baliol had presented to the King of England, which had been really brought under subjection, but which had been gradually absorbed again into Scotland. We know that a great part of this country near the English border remained for many years in peaceable possession of the English crown and subject to English administration, exercised, according to proclamation, in conformity with the old customs of Scotland. In the succession of truces

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<sup>1</sup> It was probably on account of the particular form in which this shrine displayed its miraculous powers that the celebrated Æneas Sylvius, Pope Pius II., thought it would be a suitable recipient for his thankfulness on the occasion of safely landing in Scotland after a stormy perilous voyage. He made a pilgrimage accordingly, from which he frankly admits that he had anything but benefit in the flesh, whatever else he gained. In fact, the walking ten miles thither and ten miles back barefooted on the frozen ground seems to have given him a chronic rheumatism, which held by him to the end of his days, and even while he sat in St Peter's chair.—Campani, *Vita Pii II.* The editor of the *Statuta Ecclesiæ* identifies the "Phanus" visited by him as Whitekirk.



1. The first step in the process is to identify the problem or issue that needs to be addressed. This involves gathering information and understanding the context of the problem.

2. Once the problem is identified, the next step is to define the objectives and goals of the project. This helps to clarify what needs to be achieved and provides a clear direction for the team.

3. The third step is to develop a plan or strategy to address the problem. This involves breaking down the problem into smaller, manageable tasks and determining the resources needed to complete each task.

4. The fourth step is to implement the plan. This involves putting the strategy into action and monitoring progress regularly to ensure that the project is on track.

5. The final step is to evaluate the results of the project. This involves assessing the outcomes against the objectives and goals and identifying any areas for improvement.

[illegible]

She was a widow, and Logie was the name of her husband. Her own family name is unknown, and in traditional history she is treated as a person of obscure birth, unfit to match with a king. Genealogists have found reason to believe that she was neither beautiful nor very young, while the affair is treated in the histories as an entire surrender to youthful attractions—a love-match, as it would be termed, if there had been more romance in it. Whatever may have been the motive for the union, it seems to have been an imprudent, indeed a dangerous act. Though King Edward III. was no friend of Scotland, it made a sort of standard of equality that his sister should be queen; and putting an obscure person in her place seemed to be courting the humiliation to which he would fain reduce the King of Scots. The king's partiality for England, and doubts and suspicions about his doings there, had spread an irritation and restlessness which almost broke into insurrection.

The Steward was the parliamentary heir to the throne; and he and his many adherents could not look with much satisfaction to the marriage of a man not yet forty years of age, whose offspring might supersede him; and if they could not graciously object to such a step in itself, such considerations would not tend to reconcile them to offensive specialties in his method of taking it. We find the king taking his new wife in his journeys to England, where, for aught that the credentials obtained from the English Court show, she was as highly honoured as her predecessor of the English blood-royal. They went together on a pious pilgrimage to the tomb of St Thomas à Becket. The end of the affair is mysterious. The chronicles say that she was divorced from the king, and that she got a hearing against the decree at the Court of Rome; but there is no full evidence as to the ground on which the process of divorce was raised against her, or the method in which she made her appeal, although it is believed that the Papal Court of Avignon reversed whatever had been decided to her prejudice in Scotland.<sup>1</sup>

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<sup>1</sup> She "appealed to the Roman Court at Avignon, when a keen and

jotting or memorandum, on which nothing was done. To have been feudally complete it must have been followed by a heap of ceremonies and notarial instruments. It is distinguished from its companion parchments by a special phraseology—the party to it is, for once, David, by the grace of God King of Scotland. It would have been illogical for one who was not a king to give away a kingdom. That the project was speedily abandoned is shown by the immediate resumption of the old form by which the King of Scots is recognised in the *Fœdera*—David de Bruce.<sup>1</sup> Though this affair may not have been known in Scotland, and though peace continued, yet there were abundant elements of apprehension. We can easily believe, therefore, that there was cordial satisfaction in the country when, in 1369, King Edward was again called abroad, and anxiously negotiated a fourteen years' truce with Scotland.

The parliaments held after the release of King David showed a sort of surly resoluteness in checking abuses and stretches of the prerogative. There was a general admonitory resolution demanding that strict justice should be administered between man and man in the courts of law, and that favour should be shown to no one. It was enacted that writs issuing from the King's Chapel in Chancery were not to be recalled—that is to say, that actions at law once begun should proceed before the proper tribunals in common form, and should not be stopped at the instance of any powerful person. Royal remissions for damage or injury done were to be null, unless the persons injured were satisfied. It was enacted that no justiciar, sheriff, or other ministerial officer of the crown, should execute any warrant, be it under the great seal, the privy seal, or the signet, if it were contrary to statute or common form of law. Beyond the established feudal dues nothing was to be taken from the community for the king's use without prompt payment. Horses were not to be sent to graze on peasants' lands; and those who

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<sup>1</sup> "Super nomine regnorum Angliæ et Scotiæ colloquium et tractatus."—*Fœdera* (Record edition). iii. 715, 723.

but even through their technicalities bear the impress that the rejection was made impulsively and disdainfully.<sup>1</sup> In the record of a parliament three years later, reference is made without entering into detail to four propositions: homage, the succession, the dismemberment of the kingdom, and the subsidising of an armed force to England. It was resolved that all but the last should be flung back as intolerable, and not to be admitted to deliberation.<sup>2</sup>

The English state papers reveal to us a transaction occurring between these two parliaments which, had it been known in Scotland, would have confirmed the worst fears of the country. It is a memorandum of an arrangement or private treaty between the King of England and the King of Scotland. Its purport is, that the King of England for the time being should succeed to the sovereignty of Scotland on King David's death. Scotland is neither to be a fief of England nor to be absorbed in that kingdom; it is to be entirely separate and independent, the head of the house of Plantagenet being separately crowned and inducted as King of Scotland. The arrangements for preserving the independence of the country might merit detailed examination, if the conditions had ever come up for practical adoption, or indeed been publicly known. They are the mere purport of a secret conference, the evidence of which might have been obliterated by the voracity of a rat or the many perils to which such parchments are liable. It stands alone as a mere

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tribus statibus, NUNQUAM SE VELLE CONSENTIRE ANGLICUM SUPER SE REGNARE."—*Scotichron.*, xiv. 25. Wyntoun has it—

"Thare til the States of his land,  
That in consal ware sittand,  
He movit and said he wald that ane  
Of the Kyng Edwardys sonnys war tane  
To be kyng into his sted  
Of Scotland, after that he ware dede.  
Til that said all his liegis, Nay:  
Na thai consent wald be na way  
That any Inglismannes son  
In-to that honour suld be dune."—viii. 45.

"Nullo modo voluerunt concedere nec eis aliquam assentire."  
—*Act. Parl.*, i. (Dav. II.) 135.

"Finaliter refutatis primis tribus punctis tanquam intolerabilibus et non admissibilibus deliberatum."—*Ibid.*, 139.

Among such Acts of Parliament during this reign as have been preserved to us, there are two regulating the succession to the crown with such pomp and emphasis as to show that there were reasons why the Estates should take a decisive tone. One passed at the opening of the reign, in the year 1371, enacts that the king's eldest son, John, shall succeed him. Another, passed two years later, names successively the sons of the king by his first wife, each to succeed on the failure of his elder brother, and the male children of that elder brother. If the sons of the first marriage provide no successor to the crown, then those of the second are to come in their order.<sup>1</sup> This parliamentary "entail of the crown," as it is sometimes termed, suggests a word of explanation about the king's domestic history.

In early life he had married Elizabeth, a daughter of Sir Adam Mure of Rowallan. By her he had four sons and six daughters. The daughters strengthened the royal house by marriages with the most powerful families of the country: one of them became the wife of the Lord of Islay and the Isles—a union, no doubt, intended to secure the allegiance of these half-independent regions. By his second wife, Euphemia Ross, the king had two sons and four daughters, who, like their sisters, made influential alliances by marriage. Thus he was thoroughly a patriarch king, with an offspring giving successive heirs on the failure of older lines in such abundance as might seem for ever to save Scotland from the chance of a disputed succession such as was about to desolate England.

But there was a reason for the parliamentary settlement of the crown, in the ecclesiastical or canon law, by which the children of Elizabeth Mure were held to be illegitimate. Under that law they were not born in wedlock, and under that law the parents could not have been wedded without a dispensation. That those disqualifications have been conclusively proved by adepts in the canon law, only shows historically that, in the fourteenth century, the Church had not been powerful enough to en-

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<sup>1</sup> Act Parl., Roll, ii. 182, 185.

mark on the peace of the country: in fact, the succession of a son to a father could not pass more quietly than this change of dynasty. Upwards of fifty years had passed since the parliamentary declaration of his title at the suggestion of his illustrious uncle. The rule of David was almost that of an interloper; and though his reign was long, there was so little of it real that its continuance hardly modified its provisional character. The Steward, indeed, did little more when he was crowned than continue the governing duties which had been but occasionally interrupted. The name of his family was Allan, or Fitz Allan, but it had become habitual to call them by the name of the feudal office held by them in Scotland, and hence Robert II. was the first of the Steward, or, as it came to be written, the Stewart dynasty.

They obtained their feudal influence through the office enjoyed by their ancestors at the Court of Scotland—the office of Steward. We have already seen a family named Durward, so powerful as to be in a condition to plot for sovereignty in Scotland. This family is supposed to have also had its name from a hereditary office still more humble, according to modern ideas, than that of the Steward—the Door-ward, doorkeeper, or porter; but all who had established places in the royal residence acquired political power and high rank—a political phenomenon signally exemplified in the growth of mayors of the palace in France.<sup>1</sup> In their rise these two families are notable instances of this tendency of the feudal system to give political influence to those who were near the throne, even when their functions, nominally at least, partook of a servile character.

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<sup>1</sup> According to a legend put in rhyme by Wyntoun, the origin of the Comyn family was similar to that of the Durwards. The first of the family came from Normandy to the Court of King William, and

“ He made hym, syn he was stark and stour,  
 Kepar of hys chawmbyre dure;  
 Na langage couth he spek clerly  
 Bot hys awyn langage of Normandy;  
 Nevertheles yhit quhen he  
 Oppynynd the dure til mak entrè,  
 ‘Cum in, cum in,’ he wald say,  
 As he herd othir about hym say.”

—Cronykil, viii. 6.

league or alliance bound the two countries to each other by very strong ties. Neither was to make war or peace with England without the assent of the other. When England attacked one of the allies, the other was bound to give it aid. The danger of possible interference by France in the internal affairs of Scotland seems then to have been anticipated; it was stipulated that in the case of a disputed succession France was not to interfere, but was to leave the settlement to the Scots Parliament.<sup>1</sup> A separate document, already mentioned, exists, in which the King of France engaged himself to give special aid. He promises a hundred thousand gold nobles as a contribution to the ransom money of King David, with the provision that if there should be a Papal dispensation of that debt the money is to be employed in making war on England. There is a promise to send equipments for a thousand Scots, and to send to Scotland a thousand men-at-arms of France.<sup>2</sup>

The death of Edward III. in 1377 made no immediate difference to Scotland. England was still in difficulties. They came less from foreign relations than from the insurrection of Wat Tyler and other home troubles. To Scotland it was enough that her enemy was crippled, and that the evil day when the attempts at annexation would be renewed was postponed. England desired a renewal of the fourteen years' truce, and so earnestly that, to promote the object, she was prepared to be indulgent about the settlement of the arrears of King David's ransom.

The truce could not prevent almost continual petty warfare on the borders. England, in fact, had left there an incitement to contention. It could not be that, while part of Scotland was held under English rule, the neighbouring Scots should abstain from harassing the invaders and pressing them out. They were, in fact, by slow degrees gaining back the conquered territory; and in doing so, they felt that they had only the local influences of England to resist; the central government was too seri-

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<sup>1</sup> *Fœdera*, Scots Acts, i. 195.

<sup>2</sup> Unissued vol. of Records of the Parliament of Scotland, 122.

force its rules upon the state. Nothing they can say can undo the fact, that Elizabeth Mure was the mother of a race of kings who actually reigned. Still, conformity with the ecclesiastical rules was so far by degrees prevailing, that, sanctioned as the succession of the Stewarts was by a parliamentary title, the doubts about the offspring of Elizabeth Mure seemed to hover round the throne. It was connected with the tragedy of King James I.'s death, and came out in times much later in a shape rather ludicrous than tragic.<sup>1</sup>

The marriage law was distinctly a field of contest between the two powers, the civil and the ecclesiastical; for, as this instance peculiarly exemplified, the Church was fighting neither for religion nor decorum, but for power. It was not only determining that its own ceremonies should be essential to a valid union, but that it should have in a great measure *the right to decide who could and who could not be united*. The forbidden degrees were extended to cousinhood, called the second degree of consanguinity, and protracted to the grandchildren of cousins-german. In the application of the prohibition to affinity, those unions which neither at that time, nor in later times, were allowed the privilege of marriage, were yet sufficient

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<sup>1</sup> "One would have thought all dangers to the Stewarts from this source would have been at an end by the seventeenth century. But as late as 1630, William, Earl of Menteith, lineal heir of the second family, procured himself to be served heir to David, Earl of Strathern, eldest son of Euphemia Ross; and at the same time, probably rather from foolish vanity than ambition, solemnly renounced his right to the crown of Scotland. Visionary as one would have supposed that right to be, the idea of it so alarmed Charles I. that he insisted on a reduction of the service, which was set aside on the notoriously false pretext that David, Earl of Strathern, died without issue. The Earl of Menteith was degraded from the important offices which he held,—of Justice-General, President of the Council, and Lord of Session; and the greatest anxiety was evinced by the king to efface all vestiges of evidence that the service had ever taken place."—The Lyon King-at-arms in 'Macmillan's Magazine' for June 1867, p. 109. The last conspicuous representative of Euphemia Ross and the legitimate race of Stewart was, oddly enough, Captain Barclay of Ury, illustrious a generation or two ago as a pugilist, a pedestrian, and an amateur driver of stage-coaches.



thousand men-at-arms and six thousand bowmen, slaughtering and burning as far as Edinburgh. They had scarcely gone, when Scotland received an unexpected visit of a different kind. A body of distinguished knights in the service of France, some thirty in number, felt at a loss how to dispose of themselves in time of peace, and resolved to wander to some spot where they might find war. They knew that the truce had not been communicated to Scotland, and, putting to sea at Helvoetsluys, they landed at Montrose and found their way to Perth. They sent two of their number to Edinburgh to inform the Government of their arrival, and of their desire to find employment in fighting with the English. At the very same time the ambassadors sent to communicate the truce arrived there. It was accepted by the king, or the Government acting in his name; but, embittered by the recent English raid, the Estates would not accept of it. It is in the name of the sovereign that, even under the parliamentary rule of the present day, peace and war are made. We shall afterwards see that in Scotland this power was jealously retained by the Estates. If it could have been said at this period that the consent of Parliament had no influence on such a question, the dealings of England gave it an influence. Her public documents would not yet admit Scotland to be a sovereignty, or deal with the king, and the proffer of the truce was made to "our adversary of Scotland."<sup>1</sup> Perhaps the Scots did not much concern themselves with such a nicety. They were determined to avenge the last inroad from England; and a little to the astonishment, and very much to the delight, of their visitors, these were informed that, for all the King of Scots said otherwise, they should have an opportunity of enjoying a raid into England. Froissart, who probably got his account from the French visitors, describes their delight in seeing fifteen thousand Scots mounted on their small horses ready to ride across the border. "They began their march," says he, "through the woods and forests of their country, and entered Northumberland on the lands of the Lord Percy,

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<sup>1</sup> See *passim* *Fœdera* of the period.

abject poverty. They observed that Edinburgh, the capital of the country, was inferior to the secondary towns of France, and contained but four thousand houses: in these only a portion of the two thousand could be harboured, and the rest had to seek still more sordid quarters in the neighbourhood, or in the smaller towns—some of them being scattered so far to the south as Kelso, and others northward in Fifeshire. They expected a splendid opportunity, however, for seeing the grand game of war; for England was resolved to make one of her great efforts for the annexation of Scotland. An army, said by the more moderate of the chroniclers to be fully seventy thousand strong, marched to the border, under the command of the young King Richard. The Scots doubled their usual force, and were able to muster thirty thousand. The king came to see his army and do courtesy to the strangers, but his fighting days were over. The French chronicler describes him “with red bleared eyes, of the colour of sandal-wood, which clearly showed he was no valiant man, but one who would rather remain at home than march to the field; he had, however, nine sons who loved arms.” There now arose a characteristic dispute between the strangers and the Scots leaders: Vienne was for an immediate battle; Douglas, for the Scots, proposed to follow the old-established tactic of clearing the country, and only fighting when driven to the alternative of battle. In fact, to the French war was a pastime; to the Scots it was the serious business of the world, national life or death depending on success or failure. The dispute waxed hot, and the impetuous Frenchman spoke scornfully of the spirit of his Scots allies. He was only silenced by an incident, which shows how thoroughly the Scots understood the business of war according to their own method of conducting it—how well they knew the motions of the enemy while keeping their own unrevealed. Douglas offered to let the admiral see and count the enemy, and then decide on his course. Accordingly he was taken to the top of a hill, whence, to his amazement, he could see the whole English force as if it were reviewed before him. He estimated that he saw there six thousand.



they needed but a few beams of wood to restore their burnt cottages and make themselves as comfortable as, in those unsettled times, they ever were.

Before they were done with Scotland the strangers were subjected to unpleasant experiences, from which, however, it is our good fortune to catch a singularly clear and significant picture of the social and political condition of the people. It is ever the stranger, indeed, who gives the liveliest pictures of the internal condition of a people, since he describes it by contrast; hence it was Montesquieu and De Lolme who first showed to the British people the actual practical elements of the freedom of their constitution. The French deemed themselves very scurvily used by the Scots, and their record of grievances shows the contrast between the slavish condition of the peasantry in their own country and the thorough freedom of the Scots. To an eminent Scot or other stranger in France it would be but natural to communicate, by way of hospitality, the power of the native nobles to live at free quarters and plunder the peasantry at their discretion. The French complained bitterly that they got no such privilege in Scotland. On the contrary, when they carried off a cow or the contents of a barn, the owner, with a parcel of ruffian neighbours, would assault the purveying party, and punish them savagely, insomuch that not a varlet dared leave the lines to bring in provisions. Nay, when they rode abroad, the people rudely called to them to keep the paths and not trample down the growing crops; and when the remonstrances of these churls were treated with the contempt they deserved, a score was run up against the strangers for damage done to the country folks. Froissart's bitter account of this inhospitality is confirmed by the statute-book. The French took high ground, and it was necessary that from high authority they should be told of the incompatibility of their claims with the rights of the people. The Estates took the matter up, and required the admiral to come to agreement with them by indenture, the leading stipulation of which is, that no provender is to be taken by force, and everything received by the French troops is to be duly paid for. There is a

decree," is sold to or taken possession of by the *decree-holder*, the proper remedy for the judgment-debtor to recover the whole or the excess land is by an *application* under this Section and not by a separate *suit*, as the matter is one in execution between the parties to the suit. Where, however, such possession is taken by the decree-holder, not through the officer of the Court but by his *own act*, the judgment-debtor is not barred by Section 47 from bringing a suit to recover land thus wrongly taken as the possession could not be said to have been taken in *execution* of a decree.<sup>3</sup> Similarly, where monies are improperly realised by a *third party* in defiance of an order of injunction, the question is not one between the parties and is not within the Section.<sup>4</sup> But monies unduly or wrongly realised by the decree-holder as due under a decree,<sup>5</sup> or surplus sale-proceeds or jewels wrongly seized,<sup>6</sup> or moveables misappropriated,<sup>7</sup> are recoverable only under this Section and not by a separate suit. Similarly, where the decree-holder, who has realised smaller sums in full satisfaction owing to mistake or the misrepresentation of the judgment-debtor, wants to claim the balance, the question as to the deficient execution is one relating to the execution of the decree, and a separate suit in respect thereof is barred.<sup>8</sup>

**36. Question of damages for acts done under cover of execution.**—Where damages result from acts done under cover of execution proceedings, a separate suit for the recovery of such damages lies. The question is not one relating to the execution, discharge or satisfaction of the decree itself but is one outside the decree.<sup>1</sup>

- (08) 12 Cal W N 1027 (1028).  
 (95) 22 Cal 488 (485).  
 (74) 22 Subh W R 435 (435).  
 (28) AIR 1928 Lah 936 (937).  
 (26) AIR 1926 Mad 968 (969).  
 (70) 5 Mad H C R 185 (189).  
 (38) AIR 1936 Nag 193 (194).  
 (24) AIR 1924 Nag 246 (247).  
 (24) AIR 1924 Nag 122 (123).  
 (04) 7 Oudh Cas 213 (215).  
 (19) AIR 1919 Pat 141 (142).  
 (99) 2 Upp Bur Rui 249.  
 (25) AIR 1925 Sind 126 (126); 19 Sind L R 302.  
 [But see (23) AIR 1923 All 470 (471); 45 All 916.]  
 2. (22) AIR 1922 P C 252 (253); 48 Ind App 155; 44 Mad 488 (P C).  
 (25) AIR 1925 All 551 (552).  
 (06) 3 All L Jour 601 (602).  
 (03) 1903 All W N 208 (209); 26 All 152. (Decree ordering sale of undefined rights and interests—Property sold in execution alleged to be in excess of share of judgment-debtor—Sale not objected to at the time—Suit to recover *held* not maintainable.)  
 (07) 6 Cal L Jour 257 (259).  
 (70) 14 Subh W R 39 (40).  
 (30) AIR 1930 Mad 12 (13).  
 (19) AIR 1919 Mad 269 (271); 42 Mad 753.  
 (12) 13 Ind Cas 133 (134) (Mad).  
 (38) AIR 1938 Nag 276 (281).  
 (28) AIR 1928 Rang 215 (217).  
 [But see (02) 1902 All W N 144 (145); 24 All 519.  
 (30) AIR 1930 All 865 (866). (But where he has an opportunity to appear and raise the question but does not do so, he cannot afterwards raise the question either under S. 47 or by a suit.)  
 (29) AIR 1929 Lah 121 (122). (Question between auction-purchaser and judgment-debtor.)

- (29) AIR 1929 Pat 391 (392). (Do.)  
 3. (73) 12 Beng L R 201 (203).  
 (69) 12 Subh W R 85 (86).  
 (04) 7 Oudh Cas 213 (215).  
 (25) AIR 1925 Pat 376 (378).  
 [See also (11) 11 Ind Cas 200 (201) (Cal). (Over-payment by judgment-debtor out of Court.)]  
 4. (05) 27 All 378 (380).  
 5. (30) AIR 1930 P C 86 (90) (P C).  
 (95) 17 All 478 (481).  
 (86) 1886 All W N 38 (38).  
 (78) 2 All 61 (62, 63) (P B).  
 (67) 2 Agra 45 (46).  
 (20) AIR 1920 Bom 208 (209); 44 Bom 97.  
 (28) AIR 1928 Cal 776 (777).  
 (78) 4 Cal L Rep 577 (579, 580).  
 (71) 15 Subh W R 160 (161).  
 (04) 1904 Pun Re No. 45.  
 (22) AIR 1922 Pat 166 (167); 1 Pat 386.  
 6. (97) 2 Cal W N 429 (431).  
 (75) 28 Subh W R 207 (207). (Refund of sale-proceeds since decree was compromised.)  
 (04) 14 Mad L Jour 295 (296).  
 (1900) 23 Mad 55 (58).  
 7. (16) AIR 1916 Pat 308 (309).  
 8. (01) 5 Cal W N 627 (629).  
 (82) 6 Bom 148 (150).  
 (87) 9 All 229 (231).  
 Note 36  
 1. (07) 6 Cal L Jour 527 (529).  
 [See also (06) 28 All 72 (73).  
 (69) 11 Subh W R 516 (516).  
 (08) 31 Mad 37 (39, 40).]  
 [But see (18) AIR 1918 Mad 94 (96). (S. 6 of the Malabar Compensation for Tenants' Improvement Act makes the question of damages one under S. 47.)  
 (99) 2 Oudh Cas 315 (318).]

not recognised by the executing Court,<sup>8</sup> or for damages for breach of an agreement against execution,<sup>9</sup> or of a contract to enter up satisfaction of the decree.<sup>10</sup>

See O. 21 R. 2 for a full discussion of the whole matter.

**41. Agreement against execution of decree.**—In Note 31 above, agreements against execution entered into *before* the passing of the decree have been dealt with. Where, after the passing of the decree, the parties enter into an agreement against execution of the decree, the question whether such an agreement can be pleaded as a bar to execution depends upon the nature of the agreement and the intention of the parties. If it is clearly the intention of the parties to abandon the decree and to enter into a new and different contract in supersession of the decree, the contract may form the basis of a subsequent suit and the Section is no bar.<sup>1</sup> Where, however, the agreement does not so supersede the decree but is merely pleaded as a bar to execution, the executing Court can inquire into and decide the matter under the Section,<sup>2</sup> subject to the provisions of O. 21 R. 2, where such an agreement amounts to an *adjustment* of the decree.<sup>3</sup> In *Oudh Commercial Bank Ltd. v. Bind Bansi Kuer*,<sup>4</sup> their Lordships of the Privy Council observed as follows :

“ If it appears to the Court acting under Section 47 that the true effect of the agreement was to discharge the decree forthwith in consideration of certain promises by the debtor, then no doubt the Court will not have occasion to enforce the agreement in execution proceedings, but will leave the creditor to bring a separate suit upon the contract. If, on the other hand, the agreement is intended to govern the liability of the debtor under the decree and to have effect upon the time or manner of its enforcement, it is a matter to be dealt with under Section 47. In such a case, to say that the creditor may, perhaps, have a separate suit, is to misread the Code, which, by requiring all such matters to be dealt with in execution discloses a broader view of the scope and functions of an executing Court.”

8. (113) 19 Ind Cas 622 (623) : 35 All 243.

(108) 30 All 464 (466).

(81) 3 All 538 (540).

(81) 3 All 538 (535).

(23) AIR 1923 Bom 258 (253).

(79) 4 Bom 295 (297).

(98) 25 Cal 718 (723, 724).

(79) 3 Cal 1 Rep 414 (416).

(70) 18 Suth W R 69 (73, 74) (FB).

(77) 1877 Pun Re No. 66.

(98) 21 Mad 409 (410).

(85) 8 Mad 277 (283).

(83) 6 Mad 41 (43).

(77) 1 Mad 208 (204).

(29) AIR 1929 Rang 269 (270) : 7 Rang 310.

(13) 22 Ind Cas 968 (964) : 1 Upp Bur Rui 191.

[See also (38) AIR 1938 Pesh 12 (14). (Objection that debt had been satisfied and final decree on mortgage should not be passed—Objection overruled and final decree passed—Suit for recovery for money paid is maintainable.)]

9. (12) 13 Ind Cas 944 (945) (Cal).

(84) 10 Cal 354 (356, 357).

(99) 23 Bom 394 (396, 397).

(14) AIR 1914 Mad 640 (640).

(82) 5 Mad 397 (400).

10. (18) AIR 1918 Mad 720 (721).

(23) AIR 1923 Rang 88 (89-90) : 11 Low Bur Rui 429.

## Note 41

1. (81) 3 All 781 (786).

approved.)

4. (39) AIR 1939 PC 80 (86) : 14 Luck 192 : 1 L R (1939) Kar 136 (PC). (AIR 1932 All 273

3. (13) 20 Ind Cas 874 (876) (Cal).

[See also (83) 1883 All W N 93 (96) (FB).]

the terms of the compromise.)

no power to compel the parties to comply with

to contract sale on the date mentioned and had

decree), *held*, executing Court had no option but

date of completion of sale under mortgage

peculiar terms of the compromise (postponing

[See (37) AIR 1937 Pat 672 (672). (Under the

*held* could be set up in execution.)

very of possession for consideration—Agreement

decree-holder auction-purchaser not to take deli-

decree-holder auction-purchaser not to take deli-

(83) 8 Mad L Jour 193 (194). (Agreement by

(12) 13 Ind Cas 204 (205) (Mad).

(82) 4 All 240 (242).

(35) AIR 1935 All 364 (365).

(13) 20 Ind Cas 874 (875, 876) (Cal). (Do.)

(84) 6 All 16 (17). (Agreement to give time.)

(84) 6 All 228 (230).

2. (84) 6 All 228 (230).

[See (33) AIR 1933 Mad 838 (839).]

securing some additional benefit.)

(04) 14 Mad L Jour 359 (366, 367). (Agreement

(85) 1885 Pun Re No. 51.

(03) 1903 Pun Re No. 98.

(96) 19 Bom 546 (549).

(AIR 1935 Cal 596 Reversed).

I L R (1938) 1 Cal 66 : 31 Sind L R 637 (PC).

(37) AIR 1937 P O 256 (259) : 64 Ind App 302

(33) AIR 1933 Pesh 53 (55).

**42. Contribution among judgment-debtors.**—Where one of two or more judgment-debtors purchases the decree in full<sup>1</sup> or in part,<sup>2</sup> or is compelled to pay the whole of the decree amount himself in execution,<sup>3</sup> a suit by such judgment-debtor against others for contribution and recovery of his share of the common debt is not barred, as such a question cannot be said to relate to matters in execution, discharge, or satisfaction of the decree between the parties to the suit within the meaning of the Section. As regards the general right to sue for contribution of costs paid under a decree, see Note 34 to Section 35 *ante*.

**43. Maladministration of estate of deceased judgment-debtor.**—Where a decree-holder, unable to realise the decree amount out of the estate of a deceased judgment-debtor, raises a question as to the *maladministration* of the estate by the executors, the matter is one which involves a much wider question than one merely relating to the execution of the decree and cannot be decided under this Section. A suit will, therefore, lie against the executors for the administration of the estate and for an account on the footing of maladministration.<sup>1</sup>

**44. Stay of execution.**—Under the old Code, there was a difference of opinion as to whether a question of *stay* of execution of a decree is one relating to the execution of the decree, one group of cases holding that it is,<sup>1</sup> and another, that it is not.<sup>2</sup> In order to remove this conflict, the words "or to the stay of execution thereof" were inserted in clause (c) of Section 244 by Act VII of 1888, after which the trend of decisions was uniform in holding that such questions are within the Section.<sup>3</sup> The words "or to the stay of execution thereof" were, however, omitted from Section 47 of this Code and the omission has again created a conflict of views in the various High Courts. Three such different views, at least, have been expressed—

(1) That the question of stay of execution is clearly a matter *relating to the execution* of the decree and that the decision on such a question is a *decree* and is therefore appealable.<sup>4</sup>

(2) That such a question is one relating to execution but that the decision thereon cannot be said to be one "on the rights of the parties" and consequently cannot amount to a *decree* and is therefore not appealable.<sup>5</sup>

**Note 42**

1. ('68) 9 South W R 280 (234).

2. ('88) 15 Cal 187 (198, 194).

3. ('96) 18 All 106 (107).

(198) 21 Mad 45 (46). (Contribution for costs of execution paid.)

**Note 43**

1. ('08) 35 Cal 1100 (1108). (24 Cal 478 explained.)

**Note 44**

1. ('84) 7 All 73 (78).

(188) 12 Bom 279 (280).

(188) 12 Bom 80 (81).

(186) 13 Cal 111 (112).

(186) 12 Cal 624 (625).

(181) 7 Cal 733 (735).

2. ('83) 9 Cal 214 (215).

(105) 29 Bom 71 (73). (12 Bom 279 doubted.)

3. ('98) 22 Bom 463 (472).

(104) 31 Cal 373 (375, 376).

(101) 28 Cal 734 (735, 736).

(1900) 23 Mad 568 (570).

(108) 2 Sind L R 24 (25).

(188) 10 All 389 (394). (Following 7 All 73).

4. (30) AIR 1930 Lah 187 (190) : 11 Lah 402.

(27) AIR 1927 Lah 915 (915).

(25) AIR 1925 Lah 69 (69).

(24) AIR 1924 Lah 671 (672).

(24) AIR 1924 Lah 631 (631).

(24) AIR 1924 Lah 602 (603).

(23) AIR 1923 Lah 514 (515).

(22) AIR 1922 Lah 480 (480).

(20) AIR 1920 Low Bur 138 (139) : 10 Low Bur Rul 326.

5. ('31) AIR 1931 All 129 (130, 131). (Following AIR 1929 All 85; AIR 1924 All 808.)

(33) AIR 1933 Nag 84 (85) : 29 Nag L R 121.

(29) AIR 1929 All 85 (85).

(24) AIR 1924 All 808 (808, 809, 811) : 46 All 733.

(15) AIR 1915 Cal 122 (124). (Order refusing to stay execution is not an order under S. 47 which has the characteristics of a decree under S. 2.)

(14) AIR 1914 Cal 149 (149) : 20 Ind Cas 72 (72) : 41 Cal 160.

(11) 12 Ind Cas 745 (748, 750) (Cal).

(18) 106 Ind Cas 890 (891) (Lah). (Order for security to stay execution.)

(3) The question does not relate to execution at all within the meaning of this Section.<sup>6</sup>

The first two views proceed on the assumption that omission of the words in Section 47 by the Legislature was by reason of their being considered superfluous and a surplusage.<sup>7</sup> The last view proceeds on the assumption that the omission was deliberate and intended to show that they should not be considered to be within the Section. It is submitted with respect that the last view is not correct. Reference to the history of the enactment is not a legitimate method of interpreting a Section where there is no ambiguity of any kind and there is nothing in the language of the Section itself that a stay of execution is not a matter relating to execution.

It has been held by the High Court of Madras that it is only where the order in question as to stay of execution is passed by the Court *executing the decree* that the matter will come under Section 47. An order for stay by the Appellate Court in an appeal from the decree is not one within Section 47.<sup>8</sup>

**45. Question of liability of certain property to attachment and sale.**—All objections to attachment and sale in execution of a decree raised *between parties* to the suit or their representatives on the ground that the properties are *not liable to be attached*,<sup>1</sup> or are *not saleable* in execution of that decree,<sup>2</sup> are matters coming

- (118) AIR 1918 Mad 1174 (1177) : 40 Mad 233.  
(Per Abdul Rahim Offg. C. J., Phillips J. Contra.)  
(117) AIR 1917 Mad 810 (311) : 39 Mad 541 (F.B.).  
(116) AIR 1936 Oudh 369 (370).  
(125) AIR 1925 Rang 225 (225) : 3 Rang 255.  
(Order relating to sufficiency of security held not appealable.)  
[See also (126) AIR 1926 Cal 880 (880).]  
(128) 106 Ind Cas 866 (866, 867) (Lab.).  
(124) AIR 1924 All 794 (795).  
(133) AIR 1933 Nag 84 (85) : 29 Nag L R 121.  
(121) AIR 1921 Bom 208 (208) : 45 Bom 241.  
(120) AIR 1920 Cal 71 (72).  
(127) AIR 1927 Lab 235 (235).  
(122) AIR 1928 Lab 400 (400).  
(138) AIR 1938 Rang 317 (317, 318) : 1938 Rang L R 580.  
(31) AIR 1931 Rang 221 (222) : 9 Rang 354.  
(17) AIR 1917 Mad 310 (311) : 39 Mad 541.  
(15) AIR 1915 Mad 41 (41).

#### Note 45

1. (25) AIR 1925 All 594 (595).  
(34) AIR 1934 Pat 281 (282).  
(35) AIR 1935 All 364 (366).  
(38) AIR 1938 Cal 162 (168).  
(38) AIR 1938 Cal 118 (114) : L R (1938) 1 Cal 280.  
(28) AIR 1928 Cal 94 (95, 96) : 54 Cal 1064.  
(27) AIR 1927 Cal 106 (108) : 53 Cal 837.  
(23) AIR 1928 Cal 344 (344).  
(21) AIR 1921 Cal 242 (244).  
(39) AIR 1939 Lab 256 (257).  
(35) AIR 1935 Lab 942 (943).  
(30) AIR 1930 Lab 628 (628). (Objection that the land of judgment-debtor could not be attached as he was agriculturist—On an adverse decision the judgment-debtor filed a separate suit for this purpose—It was dismissed.)  
(09) 4 Ind Cas 121 (122) (Cal).  
(10) 7 Ind Cas 48 (48) (Cal).  
(11) 10 Ind Cas 417 (420) (Cal). (Do.) holding.  
(17) AIR 1917 Cal 672 (672). (Sale of occupancy Section 266 of the old Code.)  
(91) 1891 Bom F J 207. (Not saleable under (95) 19 Bom 328 (331). (Service vatan.)  
(31) AIR 1931 Bom 446 (447). (Not saleable under Section 60, C. P. Code.)  
(85) 7 All 641 (643).  
(84) 6 All 393 (395). (Do.)  
(84) 6 All 448 (449). (Do.)  
Section 9 of the U. P. Rent Act.  
(86) 8 All 146 (147, 148) (F.B.). (Not saleable under Section 245 of the old Code.)  
(88) 1888 All W N 155 (155). (Not saleable under rights.)  
(18) AIR 1918 All 278 (279). (Bx-proprietary Section 20, Agra Tenancy Act.)  
(21) AIR 1921 All 118 (119) : 43 All 547 (F.B.). (Sale of occupancy holding—Objection based on (35) AIR 1935 All 588 (589).  
(35) AIR 1935 All 678 (682) : 58 All 98.  
(35) AIR 1935 All 1016 (1017) : 58 All 360.  
(27) AIR 1927 All 574 (575).  
2. (27) AIR 1927 All 574 (575).  
Court.]  
tion of truth of debt attached not for executing  
[But see (32) AIR 1932 Mad 169 (169). (Ques-  
See also (09) 2 Ind Cas 105 (106) (All).]  
suit is dismissed is party.)  
(36) AIR 1936 Pat 268 (270). (Person against whom (38) AIR 1938 Pat 216 (220).  
(39) AIR 1939 Nag 183 (184, 186).  
ings.)  
attachment must be raised in execution proceed-  
(12) 17 Ind Cas 126 (126) (Mad). (Objections to (32) AIR 1932 Mad 86 (89) : 55 Mad 495.  
(34) AIR 1934 Mad 435 (435) : 57 Mad 822.  
(29) AIR 1929 Lab 778 (779).



within the Section<sup>22</sup> and a separate *suit* in respect thereof will be barred. But such an objection preferred by a *third party* does not come within this Section<sup>26</sup> and a separate *suit* by him in respect thereof will not be barred.<sup>3</sup> A person against whom a *suit* has been dismissed is a party to the *suit* within the meaning of this Section and hence, an objection by such person will be covered by this Section.<sup>3a</sup> An objection raised by a judgment-debtor not in his private capacity but in a representative capacity as shewait of an idol on the ground of the property belonging to the idol, will be one by a stranger and not by a party to the *suit* and as such will not be covered by this Section.<sup>4</sup> As to whether an order on such objection by a party, and therefore coming under the Section, is *appealable* as a decree, see Note 84 *infra*.

Where a puisne mortgagee who is impleaded as a party to a *suit* on a prior mortgage objects to the sale of the mortgaged property on the ground that it belongs to him, his objection being one which attacks the decree itself, does not relate to the execution, discharge or satisfaction of the decree and hence is not covered by this Section.<sup>5</sup> But an objection by him that the sale should not be unconditional so as to conclude his rights can be entertained by the executing Court under this Section.<sup>6</sup>

See also Notes 1 and 24 to O. 21 R. 58 *infra*.

#### 46. Question, if property attached belongs to judgment-debtor. — Where,

in execution of a *money decree*, properties in the hands of the legal representative of the debtor are attached, and the representative objects to the attachment on the

- (05) 9 Cal W N 972 (972). (Judgment-debtor having no saleable interest in the property.)  
 (1900) 27 Cal 415 (416) (FB). (Sale of occupancy holding.)  
 (1900) 27 Cal 187 (189). (Do.)  
 (99) 26 Cal 727 (731). (Do. 8 All 146 Followed.)  
 (89) 16 Cal 608 (606).  
 (99) AIR 1939 Lab 113 (114, 115, 116) : 1 L R (1939) Lab 103.  
 (91) AIR 1931 Lab 141 (142). (Order refusing to sell agricultural land but ordering temporary alienation.)  
 (30) AIR 1930 Lab 628 (628). (Debtor an agriculturist.)  
 (16) AIR 1916 Mad 727 (727).  
 (93) 16 Mad 447 (449). (If the proceeding sought to be set aside relates to the execution and the consent is between the parties to the *suit* the specific ground on which the proceeding is impeached is not material within the meaning of S. 244 (now S. 47).)  
 (98) AIR 1938 Nag 558 (559).  
 (95) AIR 1935 Nag 80 (31, 32) : 31 Nag L R 217.  
 (31) AIR 1931 Oudh 45 (49) : 6 Luck 452. (Pro-  
 perty claimed as waft.)  
 (30) AIR 1930 Oudh 256 (258). (Want of sanction under S. 20 of the Oudh Laws Act.)  
 (25) AIR 1925 Oudh 618 (619) : 28 Oudh Cas 175. (Judgment-debtor having no saleable interest in the property. 8 All 146, Followed.)  
 2a. (97) AIR 1937 Pat 562 (563). (Purchaser of non-transferable holding disposed of in execution of rent decree against transferor can apply under S. 47.)  
 (29) AIR 1929 Pat 472 (472). (A defendant against whom a *suit* is dismissed is nevertheless party to the *suit*.)
- (29) AIR 1929 Pat 141 (144) : 8 Pat 717.  
 (36) AIR 1936 Pat 256 (257).  
 [See also (96) AIR 1936 Mad 733 (744, 745). (Party impleaded in *suit* in one capacity and objecting in execution proceedings in another capacity—Objection is not one within this Section.)]  
 [But see (39) AIR 1939 Sind 22 (23). (Judgment-debtor contending that properties held by him are waft properties—S. 47 applies.)]  
 (36) AIR 1936 Pat 552 (553).  
 (36) AIR 1936 Pat 552 (553).  
 (36) AIR 1936 Pat 552 (553).

ground that the property is *his own* and not that of the debtor,<sup>1</sup> or that he has a charge or lien thereon,<sup>2</sup> the question is one in execution of the decree between a party and a representative of the opposite party and is within the Section. Similarly, where a person is sued as the legal representative of a deceased person, an objection raised by such legal representative on the ground that the property attached belongs to him and not to the deceased, will come within this Section as raising a question between *the parties* to the suit.<sup>2a</sup> But, where he objects, not on his own behalf, but *as representing third parties, or as trustee*,<sup>3</sup> the objection is really one by such third parties and falls under O. 21 R. 58 and not under this Section.

#### Note 46

1. (129) AIR 1929 All 602 (603) : 51 All 878.
- (131) AIR 1934 Mad 621 (622).
- (137) AIR 1937 All 97 (98).
- (135) AIR 1935 All 183 (184).
- (128) AIR 1928 All 704 (705).
- (123) AIR 1923 All 115 (116).
- (117) AIR 1917 All 460 (461) : 39 All 47. (17 Cal 711, Followed.)
- (109) 3 Ind Cas 495 (496) (All).
- (106) 28 All 51 (53, 54).
- (103) 21 All 323 (328).
- (101) 1899 All W N 24 (24).
- (100) 12 All 313 (321, 324, 327) (FB).
- (100) 12 All 73 (78).
- (87) 9 All 605 (608).
- (85) 7 All 733 (734).
- (85) 7 All 547 (549, 550).
- (82) 4 All 190 (192).
- (84) AIR 1934 Bom 296 (297) : 58 Bom 518.
- (28) AIR 1928 Bom 534 (536) : 53 Bom 46.
- (107) 7 Ind Cas 457 (458, 459) : 34 Bom 546.
- (104) 6 Bom L R 697 (699).
- (96) 1896 Bom F J 847 (847).
- (85) 9 Bom 458 (460).
- (85) AIR 1935 Cal 14 (14).
- (34) AIR 1934 Cal 258 (259).
- (28) 115 Ind Cas 353 (353) (Cal).
- (21) AIR 1921 Cal 242 (244).
- (16) AIR 1916 Cal 814 (814). (Following 17 Cal 711.)
- (15) AIR 1915 Cal 275 (276). (Do.)
- (12) 16 Ind Cas 385 (386) (Cal) (Do).
- (12) 16 Ind Cas 255 (255) (Cal). (Decree against the L. R.)
- (1900) 27 Cal 34 (36).
- (90) 17 Cal 711 (714, 718, 721) (F B).
- (89) 16 Cal 1 (7, 8).
- (73) 20 Beng L R 65 (71).
- (73) 20 Subh W R 162 (162).
- (71) 15 Subh W R 163 (164).
- (30) AIR 1930 Lah 1068 (1070). (Decree against mortgagor's legal representative claiming independent interest and objecting to sale of that interest — To be decided in execution.)
- (27) AIR 1927 Lah 895 (896).
- (21) AIR 1921 Lah 173 (175).
- (87) 1887 Pun Re No. 47.
- (37) AIR 1937 Mad 108 (108).
- (35) AIR 1935 Mad 923 (925).
- (33) 26 Mad 501 (502).
- (94) 17 Mad 399 (400). (Objection to sale.)
- (83) 7 Mad 255 (257, 258).
- (82) 5 Mad 391 (393, 394).
- (39) AIR 1939 Nag 147 (149) : ILR (1939) Nag 165.
- (131) AIR 1931 Nag 27 (28). (Objection to sale.)
- (26) AIR 1926 Nag 476 (480).
- (103) 6 C P L R 4 (5).
- (103) AIR 1933 Oudh 473 (474). (If legal representative proves his possession the onus is on the decree-holder to prove that the property belongs to debtor.)
- (29) AIR 1929 Oudh 21 (21).
- (105) 8 Oudh Cas 405 (408).
- (98) Oudh Cas Sup Vol 60 (65). (S. 244 (now S. 47 C. P. C.) makes no distinction between representatives brought on record before and representatives brought on record after the decree.)
- (34) AIR 1934 Pat 188 (190).
- (22) AIR 1922 Pat 572 (573).
- (37) AIR 1937 Pesh 82 (83). (Objection in such a case can be raised even after sale.)
- (34) AIR 1934 Rang 127 (128).
- (28) AIR 1928 Rang 29 (30) : 5 Rang 659.
- (27) AIR 1927 Rang 273 (274) : 5 Rang 393.
- (24) AIR 1924 Rang 323 (325, 326) : 2 Rang 168.
- (31) AIR 1931 Sind 84 (87) : 25 Sind L R 374.
- (35) 47 and 53 can be extended even to property which comes into legal representative's hand by partition before judgment-debtor's death.)
- [See also (86) 1886 Bom F J 250 (251).
- (19) AIR 1919 Cal 623 (624). (A separate suit by L. R. to set aside sale does not lie — Objection ought to have been taken under Section 47. Objection that the property belonged to L. R. and not to the deceased judgment-debtor hence not liable to be sold.)]
- [But see (39) AIR 1939 Pat 354 (355, 356).
- (25) AIR 1925 Sind 156 (158).]
2. (129) AIR 1929 Lah 762 (763). (Sec. 47 is not restricted to money decrees but covers all decrees.)
- (103) 2 Ind Cas 432 (432) (Mad).
- (103) 1903 Pun L R No. 20. (Lien.)
- 2a. (39) AIR 1939 Lah 256 (257).
- (38) AIR 1938 Mad 731 (733) : ILR (1938) Mad 1080.
- (34) AIR 1934 Mad 621 (622).
- (34) AIR 1934 Rang 127 (128).
3. (16) AIR 1916 Mad 769 (769).
- (88) 15 Cal 437 (445).
- (28) AIR 1928 All 392 (393) : 50 All 801.
- (24) AIR 1924 All 183 (184). (As mutawalli of wakf.)
- (106) 28 All 644 (646).
- (106) 1906 All W N 157 (157, 158).
- (106) 3 All L Jour 370 (371).
- (85) 7 All 36 (37). (Objection as a wakf.)

Where, in execution of a mortgage decree, the mortgaged properties are brought to sale, and the legal representative of the judgment-debtor or that it could not have been validly mortgaged by him, the objection is really one which *attaches the decree itself* which directs the sale of the properties. Such an objection, therefore, cannot be gone into by the executing Court, but should be raised in a separate suit.<sup>4</sup> But, where in execution of a mortgage decree, properties *not mortgaged* are brought to sale as part of the mortgaged properties, the objection of the legal representative that such properties are his own properties will fall under this Section.<sup>5</sup>

**47. Question, if debts were contracted without legal necessity or tainted with immorality or that the attached property is self-acquired or ancestral.**—The question of the liability of a Hindu son for a debt contracted by the father and its binding nature upon him, the liability of the property of the father in the hands of the son,<sup>7</sup> and the question as to whether the debt was contracted without legal necessity,<sup>8</sup> are questions relating to the execution of the decree and must be determined under this Section. Similarly, the objection to the execution of the decree that the debts are tainted with immorality or illegality can be gone into in execution proceedings under this Section.<sup>9</sup> The question whether the property is ancestral or self-acquired in the hands of the sons to satisfy their father's debts is again one

- (180) 2 All 752 (1953).  
(198) 23 Bom 237 (242, 243).  
(115) AIR 1915 Cal 327 (331) : 42 Cal 440. (As a shabait of an idol.)  
(13) 20 Ind Cas 790 (791, 792) (Cal). (Do.)  
(11) 12 Ind Cas 163 (164) : 39 Cal 298.  
(08) 12 Cal W N 308 (309).  
(07) 11 Cal W N 145 (147).  
(02) 6 Cal W N 663 (667). (A separate suit by a shabait to set aside the sale of debutter property was held maintainable.)  
(02) 6 Cal W N 63 (64, 65).  
(90) 17 Cal 57 (65). (As a shabait of an idol.)  
(87) 1887 Pun Re No. 12.  
(18) AIR 1918 Mad 1140 (1140).  
(08) 31 Mad 125 (126). (Objection as a trustee.)  
(1900) 23 Mad 195 (202) (F B). (Do.)  
(39) AIR 1939 Nag 183 (185).  
(30) AIR 1930 Nag 298 (294) : 27 Nag L R 10.  
(11) 12 Ind Cas 411 (411) (Oudh). (Objection as a trustee of the property for religious purposes.)  
(22) AIR 1922 Pat 196 (196) : 1 Pat 637.  
[But see (89) 1889 Pun Re No. 9. (The question whether the attached property is of the judgment-debtor is one relating to execution.)  
(27) AIR 1927 Oudh 120 (120, 122) : 2 Luck 145.]  
4. (99) 12 C P L R 73 (77).  
(32) 55 Cal L Jour 114 (119). (Sons of mortgagor also implicated in suit—Decree—Saleability of property in decree cannot be questioned in execution.)  
(32) AIR 1932 All 49 (50). (Mortgagor's L. R. pleading rights under a paramount title acquired before final decree but not provided for therein cannot be raised in execution.)  
(12) 14 Ind Cas 7 (8) (Cal).  
[See also (34) AIR 1934 Cal 118 (119).]

# Note 47

- (93) AIR 1939 Lab 178 (179, 180). (Reversing A I R 1939 Lab 51.)  
(35) AIR 1935 Lab 549 (550).  
(09) 2 Ind Cas 18 (23) : 32 Mad 429. (Dissenting from 7 Mad 255 which was however approved by the Privy Council on another point.)  
[See also (29) AIR 1929 All 291 (293) : 51 All 752. (Order imposing conditions on the order of sale of properties fixed by decree.)  
(35) AIR 1935 Bom 95 (96). (Mortgage decree on null and void—Objection taken in execution that it is not saleable, and not taken at the trial of suit—Objection cannot be allowed in execution.)  
(29) AIR 1929 Rang 275 (275).]  
[But see (36) AIR 1936 Mad 675 (677). (Question of paramount title can be raised under S. 47.)]  
5. (39) AIR 1939 All 368 (369) : 1 L R (1939) All 385.  
1. (18) AIR 1918 All 397 (398).  
(09) 1 Ind Cas 459 (459) : 33 Bom 39. (Son objecting the execution on the ground of immorality of debts.)  
(30) 127 Ind Cas 507 (509) (Bom). (33 Bom 39; AIR 1918 Bom 13, Foll.)  
(09) 1 Ind Cas 442 (444) (Cal).  
(07) 34 Cal 642 (648, 651, 657) (F B).  
(87) 1887 Pun Re No. 87.  
2. (12) 13 Ind Cas 670 (671) (Lab).  
(08) 10 Bom L R 939 (942, 943) : 33 Bom 39.  
(96) 20 Bom 385 (389).  
(10) 6 Ind Cas 582 (583) (Cal).  
(06) 33 Cal 676 (678).  
(23) AIR 1923 Pat 143 (148) : 6 Pat L Jour 45E.  
[See also (34) AIR 1934 Cal 118 (119).]

relating to the execution of the decree and the objection, therefore, that ancestral property has been sold as self-acquired or *vice versa* is one coming under the Section.<sup>4</sup> But where a suit on a promissory note is filed against the eldest brother (in a joint Hindu family) as a personal claim and a decree is obtained, the question of the binding character of the debt as against the other members of the joint family who are not sons or descendants of the judgment-debtor cannot be gone into in execution proceedings.<sup>5</sup>

48. Question as to the transferability of the property proceeded against. — Where application is made to execute a decree for money by the attachment and sale of an occupancy holding, the judgment-debtor is entitled under this Section to raise the question that the holding is not saleable according to custom or usage and to have that question determined in execution proceedings.<sup>1</sup> See also Note 45 above.

49. Question between decree-holder and judgment-debtor in which auction-purchaser is interested. — A question relating to execution, discharge, or satisfaction of the decree "between the parties" must be determined under this Section.<sup>1</sup> The fact that the auction-purchaser is interested in such a question does not take it out of the Section.<sup>2</sup> In *Prosanna Kumar Sunyal v. Kalidas Sunyal*,<sup>3</sup> their Lordships of the Privy Council observed as follows :

"When a question has arisen as to the execution, discharge or satisfaction of a decree between the parties to the suit in which the decree was passed, the fact that the purchaser who is no party to the suit is interested in the result, has never been held a bar to the application of the Section."

As to what is a question between the parties, see Note 5, *ante*.

As to questions relating to delivery of possession, see Note 19, *ante*.

4. ('09) 3 Ind Cas 763 (764) (Bom).  
(1906) 28 All 273 (275, 276).  
(1900) 22 All 108 (110, 111).  
(1910) 5 Ind Cas 362 (364) : 33 Mad 423.  
(1930) AIR 1930 Oudh 256 (258).  
5. ('35) AIR 1935 Mad 145 (146).  
Note 48  
(1933) AIR 1933 Mad 598 (607) : 56 Mad 808, (Do.)  
interested is within the Section.)

**Note 48**

Interested is within the Section)

(93) AIR 1938 Mad 598 (607; 56 Mad 808, (D.O.).  
(94) AIR 1934 Lah 105 (106). (D.O.).  
(17) AIR 1917 P O 121 (123) : 41 Mad 408 : 45  
Ind App 54 (P.C).

(10) 7 Ind Cas 457 (458) (Bom), (Judgment-debtor  
not allowed to attack sale by way of defence to  
suit for possession by auction-purchaser.)

(109) 3 Ind Cas 768 (764) (Bom)  
(190) AIR 1930 Pat 210 (212) (Objection to sale.)  
(110) 7 Ind Cas 48 (48) (Cal). (Application to set  
aside sale.)

(97) 24 Cal 355 (358). (Objection to sale.)  
(86) 8 All 146 (148) (P.B.).  
(95) AIR 1935 All 588 (589).  
(1900) 27 Cal 187 (189). (D.O.).  
I. (07) 11 Cal W N 88 (85). (Objection to sale.)

1. ('03) 13 Mad L Jour 237 (238) : 26 Mad 740.  
 ('Decree-holder himself auction-purchaser.)  
 ('98) 16 Mad 447 (449). (Do).  
 3. ('92) 19 Cal 683 (688, 689).  
 ('10) 8 Ind Gas 429 (429) : 34 Mad 417.  
 ('28) AIR 1928 Mad 806 (807).  
 under this Section.)  
 refund of purchase money — Question is one  
 aside — Application by auction-purchaser for  
 ('37) AIR 1937 Mad 779 (781). (Execution sale set  
 ('99) 26 Cal 539 (544).  
 ('28) AIR 1928 Cal 865 (866).  
 ('07) 31 Bom 207 (215).  
 ('09) 3 Ind Gas 768 (764) (Bom).  
 suit for possession by auction-purchaser.)

Note 49

1. (.07) 11 Cal W N 88 (85). (Objection to sale.)  
(1900) 27 Cal 187 (189). (D.O.)  
(.35) AIR 1935 All 588 (589).  
(.86) 8 All 146 (148) (F B).  
(.97) 24 Cal 355 (358). (Objection to sale.)  
(.10) 7 Ind Gas 48 (48) (Cal). (Application to set  
aside sale.)  
(.20) AIR 1920 Pat 710 (710). (Objection to sale.)  
[But see (84) 8 Bom 185 (187). (Where property  
cannot be objected to on the ground of its non-  
transferability in execution proceedings.)  
(.03) 7 Cal W N 607 (608).  
(.20) AIR 1920 Pat 715 (715). (Doubled.)]

4. ('09) 3 Ind Cas 763 (764) (Bom).  
('06) 28 All 273 (275, 276).  
(1900) 22 All 108 (110, 111).  
(10) 5 Ind Cas 362 (364) : 33 Mad 423.  
(30) AIR 1930 Oudh 256 (258).  
5. ('35) AIR 1935 Mad 145 (146).

**51. Setting aside sales in execution.**—As between the judgment-debtor and a decree-holder an objection to the sale in execution of the decree or an application to set it aside is one in execution and must be determined in execution and not by a separate suit.<sup>1</sup> But the power to set aside the sale, in cases where the grounds for so setting it aside fall within O. 21 Rr. 89, 90 or 91, is circumscribed by those provisions. To hold otherwise would be to render those provisions superfluous so far as parties to the suit or their representatives are concerned. An application to set aside a sale on grounds *not within the purview of those provisions* must be dealt with under this Section independently of those provisions.<sup>2</sup>

**52. Decree obtained by fraud.**—A question whether a decree was obtained by fraud or collusion is not one which relates to the execution of the decree but one which affects its very subsistence and *validity* and such a question can only be raised by a separate suit.<sup>1</sup> See also Note 29 *supra* and Section 38 Note 8. Therefore, where not only the sale is impugned as being fraudulent, but the very decree in execution of which the sale took place is impeached as having been obtained by fraud, the Section is not a bar to a suit to set aside the sale thereunder.<sup>2</sup>

**53. Fraud in execution proceedings.**—Where a judgment-debtor impeaches the validity of an execution sale, not on the ground of fraud in the *publishing* and *conducting* of the sale, but on the ground of fraud in execution proceedings which *preceded and led up* to the sale, the question, as between the parties, is one falling within this Section and not under O. 21 R. 90.<sup>1</sup>

#### Note 51

1. (11) 34 Mad 417 (418).  
(10) 7 Ind Cas 457 (458, 459) : 34 Bom 546.

(05) 1905 All W N 55 (56).  
(98) 20 All 254 (256, 258).

(93) AIR 1934 Nag 21 (27) : 31 Nag L R 67.  
(Application by judgment-debtor to set aside sale

—Application made against decree-holder and auction-purchaser not made party—Application is one under this Section.)

(13) 21 Ind Cas 570 (571) : 16 Oudh Cas 255.  
(05) 8 Oudh Cas 254 (256).

(31) AIR 1931 Pat 97 (98).  
2. See (37) AIR 1937 All 407 (409, 410).

#### Note 52

1. (10) 7 Ind Cas 11 (14) (All).

(96) 23 AIR 639 (641).  
(20) AIR 1920 Lah 164 (164).

(16) AIR 1916 Mad 792 (793) : 38 Mad 221.  
(89) 12 Mad 503 (504).

(86) 9 Mad 80 (83).  
(99) 12 C P L R 82 (83, 84, 85).

2. (14) AIR 1914 P C 72 (73) : 42 Cal 244 : 41 Ind App 267 (P O).  
(02) 6 Cal W N 473 (477) : 29 Cal 1995: 29 Ind App 99 (P O).

(01) 28 Cal 475 (478, 479) (P O).  
(01) 5 Cal W N 559 (560, 561).

(1900) 27 Cal 197 (200).  
(99) 26 Cal 326n (332n).

(97) 24 Cal 546 (551).  
(97) 21 Cal 605 (608).

#### Note 53

1. (11) 10 Ind Cas 625 (625) (Cal).  
(17) AIR 1917 Low Bur 80 (81).

(06) 28 All 681 (682, 683).  
(05) 27 All 702 (703).

(02) 24 All 239 (241).

(01) 23 All 478 (480).  
(09) 4 Ind Cas 253 (254) : 33 Bom 698.

(85) 9 Bom 468 (471).  
(82) 6 Bom 148 (150).

(26) AIR 1926 Cal 1219 (1220).  
(18) AIR 1918 Cal 171 (173). (Fraudulent suppression of process.)

(16) AIR 1916 Cal 109 (110).  
(09) 3 Ind Cas 116 (117) (Cal).

(07) 5 Cal L Jour 328 (331).  
(06) 10 Cal W N 130 (133) : 33 Cal 84.

(02) 6 Cal W N 258 (259).  
(02) 6 Cal W N 258 (259).

(02) 6 Cal W N 258 (259).  
2. See (37) AIR 1937 All 407 (409, 410).

(01) 28 Cal 116 (118).  
(1900) 4 Cal W N 538 (540).

(99) 26 Cal 539 (542).  
(99) 3 Cal W N 399 (400) : 26 Cal 324.

(99) 3 Cal W N 399 (400). (Notes of Cases.)  
(98) 2 Cal W N 691 (693).

(92) 19 Cal 688 (689) : 19 Ind App 166 (P O).  
(90) 17 Cal 769 (772, 777) (F B).

(84) 10 Cal 410 (412).  
(80) AIR 1930 Mad 489 (489). (Omission to serve notice of sale proclamation.)

(80) 2 Mad 264 (270).  
(18) AIR 1918 Oudh 379 (385).

(21) AIR 1921 Pat 54 (57).  
(19) AIR 1919 Pat 396 (398).

See also (36) 40 Cal W N 428. (Mortgage decree—Execution sale—Suit for declaration of invalidity on ground of wrongful and fraudulent inclusion of properties not comprised in the mortgage—Suit not maintainable.)

(05) 1 Cal L Jour 476 (480, 481) : 32 Cal 1957 (FB).

**54. Fraud anterior to sale.** — See Note 53 above.

**55. Fraud in publishing and conducting the sale.** — As has been seen in Note 51 *ante*, the question of setting aside an execution sale on any ground is, as between the parties, one falling under this Section. This would therefore include an application to set aside a sale for fraud in publishing and conducting the sale.<sup>1</sup> The question, however, whether such an application falls within the terms of O. 21 R. 90 is important because, if it does, the Court cannot, except under the conditions specified in that Rule, set aside the sale. (See Note 51.) It is also important for the purpose of determining whether it is a *decree* or only an *appealable order*. For, if it is one covered by O. 21 R. 90, it is only an appealable order though it may fall under Section 47 also, inasmuch as Section 2 clause (2) enacts that the word "decree" includes the determination of any question within Section 47 but does not include any adjudication *from which appeal* lies as an appeal from an order. The word "fraud" was absent in Section 311 of the old Code corresponding to O. 21 R. 90 of the present Code, and, in the absence thereof, it was held that an application to set aside a sale on the ground of fraud could only come under Section 244 (now Section 47) and not under Section 311.<sup>2</sup> Under the present Code, however, O. 21 R. 90 covers such cases<sup>3</sup> though the provisions of the new Code cannot retrospectively affect the character of an order passed under the old Code and take it out of the Section.<sup>4</sup>

An application to set aside a sale on *grounds not within* O. 21 R. 90 and 91 falls, as has been seen in Note 51 *ante*, under Section 47 only and the order on such application is appealable as a decree.<sup>5</sup> See Notes under O. 21 R. 90, Note 10.

**56. Other grounds for setting aside sale.** — See Notes 57 to 71, *infra*.

**57. Property not saleable.** — See Note 45 above.

**58. Reversal of decree.** — As has been seen in Note 51 *ante*, the question between the parties of *setting aside the sale* on any ground (including the ground of reversal or variation of the decree) is one in execution falling within this Section. As to whether a claim for restitution of properties taken in execution of such a decree is one in execution of the decree or not, see Notes 30 and 33 of Section 144 *infra*.

**59. Amendment of decree after sale.** — See Notes 39 and 58 above and Notes 4, 13, 30 and 33 to Section 144 *infra*.

**60. Ex parte decree set aside after sale.** — Where a property is sold in execution of an *ex parte* decree and purchased by the decree-holder and the decree is subsequently set aside under O. 9 R. 13, an application under this Section and not a suit is the remedy to set aside the sale.<sup>1</sup> See Note 51 *ante*.

(38) AIR 1938 Lah 690 (691). (Application under O. 21 R. 89 fraudulently removed and Court not passing orders thereon — Question of fraud cannot be agitated in a separate suit.)

#### Note 55

1. (31) AIR 1931 Pat 97 (98).  
1a. (05) 2 All L Jour 469 (470) : 27 All 702.

(04) 31 Cal 385 (390).  
(99) 26 Cal 539 (540, 544, 545).

(89) 26 Cal 824 (326, 331).

(92) 19 Cal 341 (344, 345).

(91) 18 Cal 139 (143).

(82) 5 Mad 217 (219).

2. (11) 9 Ind Cas 135 (135, 136) (Cal).

(29) AIR 1929 Nag 130 (131) : 25 Nag L.R. 58.

(28) AIR 1928 All 354 (354).

(09) 1 Ind Cas 744 (744) : 31 All 364.

#### Note 60

[See also (24) AIR 1924 Mad 778 (779).]  
without attachment—Second appeal lies.]

(36) AIR 1936 Lah 573 (574). (Order setting aside sale for want of jurisdiction to sell property aside sale on the ground of its being null and void.)

(37) AIR 1937 All 407 (410). (Application to set

(19) AIR 1919 Pat 396 (398).

attachment and sale.)

4. (94) 7 C P L R 14 (15). (Irregularity in

3. (12) 16 Ind Cas 690 (691) (Cal).

[See (28) AIR 1928 Lah 444 (444).]

(31) AIR 1931 Rang 179 (180).

**61. Want of notice under O. 21 Rr. 16, 22 and 66.**—An objection against a sale in execution of a decree on the ground that no notice was served on the judgment-debtor under O. 21 R. 22,<sup>1</sup> or under Rule 66,<sup>2</sup> and an application to set it aside on that ground is one falling under the Section. Where, however, such notice is not necessary the question cannot be considered to be one under the Section.<sup>3</sup> The question of the irregularity or illegality of a notice under O. 21 R. 16, and its effect upon execution proceedings and sale is, as between the parties, one that must be determined under this Section.<sup>4</sup>

**62. Purchase by decree-holder without permission.**—A judgment-debtor seeking to set aside a sale of his land on the ground that the decree-holder has purchased it without permission to bid, must proceed only under this Section and not by a suit.<sup>1</sup>

**63. Setting aside sale on deposit.**—Under the old Code, an order under Section 310 A (O. 21 R. 89) was not appealable *as an order* and it was held that a question of setting aside a sale on deposit of the decree amount was, as between the parties, one under Section 244 (now Section 47) of the Code, and open to second appeal.<sup>1</sup> Under the present Code, however, such an order is only an *appealable order* and, though it may be one under Section 47 also, is not a decree open to second appeal.<sup>2</sup> See Note 55 above.

**64. Judgment-debtor having no saleable interest.**—Order 21 R. 91 enacts that a *purchaser* at the execution sale can apply to have the sale set aside on the ground that the judgment-debtor had no saleable interest in the property sold. Obviously, such an application is not one between parties to the suit and does not lie under Section 47.<sup>1</sup> A *judgment-debtor* seeking to set aside the sale on the ground that

- (20) AIR 1920 Bom 12 (12) : 44 Bom 702.  
(19) AIR 1919 Bom 175 (176) : 43 Bom 235.  
(17) 6 Cal L. Jour 102 (104).  
(99) 3 Cal W N 6 (7).  
(98) 25 Cal 175 (177, 178).  
**Note 61**  
1. (26) AIR 1926 Cal 539 (540).  
(18) AIR 1918 Cal 171 (172).  
(31) AIR 1931 All 145 (146).  
(81) 3 All 424 (426).  
(31) AIR 1931 Cal 555 (556) : 58 Cal 825.  
(12) 15 Ind Cas 506 (507) : 40 Cal 45.  
(11) 9 Ind Cas 584 (585) (Cal).  
(10) 5 Ind Cas 390 (393, 394) (Cal).  
(98) 21 Cal 19 (22, 23).  
(30) AIR 1930 Mad 12 (15).  
(24) AIR 1924 Mad 431 (436, 437) : 47 Mad 288 (FR).  
(26) AIR 1926 Pat 397 (397).  
(24) AIR 1924 Pat 67 (68).  
(24) AIR 1924 Pat 67 (68).  
(24) AIR 1924 Pat 67 (68).  
(25) AIR 1925 Mad 1142 (1142).  
(20) AIR 1920 Mad 481 (484).  
(19) AIR 1919 Pat 396 (398).  
(24) AIR 1924 Rang 124 (124) : 1 Rang 533.  
(24) AIR 1924 Pat 111 (112) : 2 Pat 916.  
4. (20) AIR 1920 Lab 251 (253).  
**Note 62**  
1. (22) AIR 1922 P C 386 (388) : 49 Ind App 312 : 1 Pat 733 (P C).  
(01) 23 All 478 (480).

- (1900) 22 All 108 (110).  
(98) 22 Bom 271 (277).  
(98) 22 Bom 271 (277).  
(87) 11 Bom 588 (590).  
(32) AIR 1932 Cal 672 (674) : 36 Cal W N 125 (126, 127) : 59 Cal 956. (Receiver having no special leave to bid.)  
(28) A I R 1928 Lab 666 (667).  
(12) 17 Ind Cas 126 (126) (Mad).  
(98) 16 Mad 287 (289).  
(82) 5 Mad 217 (219).  
**Note 63**  
1. (07) 29 All 275 (276).  
(07) 31 Bom 207 (214).  
(01) 25 Bom 418 (422).  
(11) 10 Ind Cas 51 (53) (Cal).  
(08) 7 Cal L. Jour 282 (284).  
(01) 28 Cal 73 (76).  
(1900) 6 Cal W N 57 (60).  
(97) 1 Cal W N 703 (705).  
(10) 8 Ind Cas 855 (856) (Mad).  
(07) 30 Mad 507 (508).  
(98) 21 Mad 416 (417).  
(02) 5 Oudh Cas 377 (378).  
(20) AIR 1920 Bom 60 (60) : 44 Bom 472 (473, 474).  
(11) 10 Ind Cas 345 (345) : 38 Cal 339.  
(26) AIR 1926 Mad 620 (621). (Doubtful if a second appeal lies from an order under O. 21 R. 89 even if auction-purchaser is the decree-holder.)  
**Note 64**  
1. (09) 3 Ind Cas 438 (439) (Cal).

he had no saleable interest cannot do so under O. 21 R. 91. Nor can he, as against the *action-purchaser*, do so under Section 47, as the question is not one between parties to the suit.<sup>2</sup> As against the decree-holder, however, such an application will clearly fall under Section 47 and a fresh suit will be barred in respect of such relief.<sup>3</sup> But where the sale is in execution of a *mortgage decree*, an objection that the judgment-debtor had no saleable interest in the property is really an attack on the decree itself and cannot be gone into by the executing Court.<sup>4</sup>

**65. Sale in contravention of the Transfer of Property Act.**—A sale of property in contravention of the provisions of Order 34 of this Code can be set aside, as between the parties to the suit, only by an application under this Section and not by a suit.<sup>1</sup>

**66. Sale in contravention of stay order.**—An application to set aside a sale held in contravention of a stay order is as between the parties to the suit one under this Section.<sup>1</sup> But where the original application for stay as well as the order for stay is without jurisdiction, as where an application was made to the original Court after the transfer of the decree to the Collector for execution under Section 68 of the Code, an application to set aside the sale on the ground of its being one in contravention of the stay order is not one under Section 47.<sup>2</sup>

**67. Sale in contravention of injunction order.**—Where a judgment-debtor seeks to set aside the sale on the ground that it was held during the pendency of a temporary injunction, his remedy, if any, is by an application under this Section and not by a separate suit.<sup>1</sup> It has been held that where a sale takes place in contravention of an express direction of the Court, the latter has an *inherent* power to set it aside *suo motu*.<sup>2</sup>

**68. Sale not warranted by decree.**—The proper procedure to set aside a sale on the ground that it is not warranted by the terms of the decree or that it was held in contravention of the directions contained therein is, as between the parties to the suit, by an application under this Section and not by a suit.<sup>1</sup>

**69. Sale under time-barred decree.**—A separate suit does not lie to set aside a sale in execution of a decree on the ground that at the time of execution it was barred by time; the remedy as between the parties to the suit is by an application under this Section.<sup>1</sup> See also Order 21 Rule 94.

(93) AIR 1933 Lah 570 (573). (To set aside sale on the ground that non-mortgaged properties have been sold before sale of mortgaged properties.)

2. (83) 1883 All W N 218 (218).

(24) AIR 1924 All 273 (274).

[See also (85) 7 All 641 (644).]

3. (83) 1883 All W N 218 (218).

4. (26) AIR 1926 Pat 202 (204): 4 Pat 696.

(29) AIR 1929 Rang 275 (275).

Note 65

1. (17) AIR 1917 P C 121 (123): 45 Ind App 54:

41 Mad 403 (PC).

(06) 28 All 681 (682, 683).

(21) AIR 1921 Bom 285 (287, 288): 45 Bom 174.

(07) 9 Bom L R 462 (466).

(08) 35 Cal 61 (66, 80) (FB).

(06) 33 Cal 283 (286).

(03) 30 Cal 142 (153).

(07) 30 Mad 818 (815).

(1900) 23 Mad 377 (382).

1. (13) 21 Ind Cas 938 (940) (Cal).

Note 69

(28) AIR 1928 Rang 215 (217).

(12) 13 Ind Cas 133 (134) (Mad).

(17) AIR 1917 Mad 877 (879).

(28) AIR 1928 Mad 140 (141).

(75) 24 Suth W R 452 (452).

1. (25) AIR 1925 All 551 (552).

Note 68

(33) AIR 1933 Mad 399 (400, 401).

2. (31) AIR 1931 Lah 344 (344): 12 Lah 602.

Note 67

2. (28) AIR 1928 Bom 189 (190): 52 Bom 290.

(24) AIR 1924 All 698 (699).

1. (26) AIR 1926 All 457 (459).

Note 66

(05) 8 Oudh Cas 327 (337).

(99) 22 Mad 347 (349).



**70. Sale without jurisdiction.**—Even where the sale is held without jurisdiction, as where, at the time of the sale the judgment-debtor is dead,<sup>1</sup> or the property is outside the territorial jurisdiction of the Court,<sup>2</sup> a party seeking to set aside the sale on that ground must do so under this Section.

**71. Other grounds for setting aside sale.**—A judgment-debtor may seek to set aside an execution sale on grounds other than the ones set out above in Notes 54 to 70. The following are some of the cases in which only an *application* under this Section lies and not a separate suit—

- (a) Where the receiver of an insolvent's estate seeks to set aside an execution sale on the ground of a prior adjudication of the debtor.<sup>1</sup>
- (b) An objection by the judgment-debtor to the sale founded on a misdescription of the terms of the decree in the execution application.<sup>2</sup>
- (c) An objection by the judgment-debtor that the execution sale was void on the ground that the auction-purchaser, the liquidator of the decree-holder company, was not competent to bid for, and purchase, any property as liquidator under law.<sup>3</sup>
- (d) Where the decree-holder seeks to set aside a sale on the ground of material irregularity in that the permission granted to him to bid has been modified behind his back.<sup>4</sup>
- (e) Where the sale is sought to be set aside on the ground of failure of the purchaser to make the deposit of 25 per cent. required under O. 21 R. 84.<sup>5</sup>
- (f) Where it is sought to be set aside on the ground that the decree has been satisfied before the sale.<sup>6</sup>
- (g) Where the decree-holder seeks to set aside the sale on the ground that the decree-holder's own property was sold by mistake instead of that of the judgment-debtor.<sup>7-9</sup> See also Note 6 to O. 21 R. 64.
- (h) Where the sale is sought to be set aside on the ground that the petition to set aside the sale was compromised behind the applicant's back and in fraud of his rights,<sup>9</sup> or by the judgment-debtor's son without authority.<sup>10</sup>
- (i) Where a receiver appointed under O. 40 R. 1 purchases the property in court-sale in the capacity of decree-holder without obtaining *special* leave for that purpose, even though he has obtained leave under O. 21 R. 72.<sup>11</sup>

**72a. Miscellaneous.**—Apart from the particular classes of questions relating to the execution, discharge or satisfaction of the decree, discussed in Notes 29 to 71

(73) 20 South W R 5 (6).  
(70) 13 South W R 273 (274, 275).

**Note 70**

1. (15) AIR 1915 Cal 268 (271).  
(90) 12 All 440 (446) (FB).

2. (24) AIR 1924 All 261 (262, 263) : 46 All 153.  
(90) 17 Cal 699 (704) (FB).

**Note 71**

1. (17) AIR 1917 Mad 924 (925).  
(95) AIR 1935 Cal 508 (504) : 62 Cal 457. (The

receiver is the representative of both the insolvent and his creditor.)  
2. (98) 8 Mad L Jour 115 (116).

3. (28) AIR 1928 Lah 666 (667).  
4. (25) AIR 1925 Oudh 381 (382).

5. (89) 16 Cal 33 (36, 39).

11. (32) AIR 1932 Cal 672 (674) : 69 Cal 355.

10. (02) 24 All 209 (210, 211).

9. (09) 3 Ind Cas 116 (117) (Cal).

7-8. (28) AIR 1928 Cal 865 (867).

Court.)]

Sale cannot be set aside on ground of authority—

(10) 37 Cal 107 (116). (Bona fide purchaser—

chaser—Sale cannot be set aside.)

[See also (97) 21 Bom 468 (464). (Bona fide purchaser—

(11) 9 Ind Cas 452 (452) (Low Bur).

(18) 21 Ind Cas 938 (942) (Cal).

(11) 12 Ind Cas 911 (912) : 36 Bom 156.

(94) 16 All 5 (8).

6. (1900) 22 All 86 (88). (Suit by decree-holder

and judgment-debtor against auction-purchaser.)

amount makes the sale void.)

(11) 9 Ind Cas 66 (67) (Cal). (Failure to pay the

- supra*, the following have also been held to be questions coming within the Section—
1. A question as to the legality of the procedure or the jurisdiction of the executing Court to order a sale.<sup>1</sup>
  2. An order deciding whether a decree is time-barred or not.<sup>2</sup>
  3. An order directing execution to issue or refusing to execute a decree.<sup>3</sup>
  4. An order recognising, or refusing to recognise, an assignment of a decree.<sup>4</sup>
  5. The determination of a question in execution as to who is the legal representative of a party to the suit.<sup>5</sup> (See also Note 27.)
  6. An order on an application for transfer of a decree.<sup>6</sup>
  7. An order directing mortgaged properties to be sold in a particular order.<sup>7</sup>
  8. All questions regarding liability to attachment and sale.<sup>8</sup>

### Note 71a

1. ('29) AIR 1929 Lah 449 (452). (Objection regarding defect of attachment.)
- ('20) AIR 1920 Lah 443 (444).
- ('20) AIR 1920 Oudh 21 (22).
- ('28) AIR 1928 Rang 40 (41); 5 Rang 775. (Refusal of the transmitting Court to decide executability of decree and leaving it to the executing Court.)
2. ('24) AIR 1924 Pat 683 (685, 686).
- ('29) AIR 1929 All 287 (287) : 51 All 640.
- ('13) 21 Ind Cas 938 (940) (Cal).
- ('14) AIR 1914 Lah 415 (416) : 1913 Pun Re No. 110.
3. ('36) AIR 1936 Mad 801 (801).
- ('27) AIR 1927 Mad 842 (843).
- ('15) AIR 1915 Cal 238 (239).
- ('15) AIR 1915 Mad 197 (198) : 12 Ind Cas 664 (666) : 37 Mad 29.
- ('15) AIR 1915 P C 88 (89) (PC). (Disallowing judgment-debtor's objections to execution.)
- ('14) AIR 1914 All 288 (289). (Do.)
- ('88) 1888 All W N 245 (246). (Do.)
- ('01) 28 Cal 81 (83) (Do.)
- ('83) 9 Cal 872 (874). (Do.)
- ('13) 19 Ind Cas 921 (922) (Lah). (Do.)
- ('16) AIR 1916 Upp Bur 1 (2) : 2 Upp Bur Rul 119. (Order refusing to execute.)
- ('27) AIR 1927 All 574 (575). (Do.)
- ('03) 25 All 443 (445).
- ('87) 1887 All W N 19 (20) : 9 All 229. (Refusal to execute for the amount claimed.)
- ('83) 5 All 212 (213, 214). (Order requiring successful certificate before execution.)
- ('83) 7 Bom 301 (302). (Refusal of an order under O. 21 R. 21.)
- ('37) AIR 1937 Cal 425 (426). (Order directing execution to proceed.)
- ('09) 1 Ind Cas 284 (284, 285) (Cal).
- ('29) AIR 1929 Lah 390 (390). (Order holding that amount due under an installment decree did not fall due under a default clause.)
- ('24) AIR 1924 Lah 604 (604, 605). (Refusal to execute against the person of the judgment-debtor.)
- ('20) AIR 1920 Lah 117 (118).
- ('35) AIR 1935 Mad 647 (648).
- ('08) 31 Mad 406 (408).
- ('94) 17 Mad 394 (395). (An order under O. 21 R. 15)
- allowing one of several decree-holders to apply for execution.)
- ('26) AIR 1926 Pat 202 (203) : 4 Pat 696. (On the ground that property comprised in the decree not saleable.)
- ('22) AIR 1922 Pat 59 (60).
- ('36) AIR 1936 Pesh 46 (47). (Order refusing execution and directing the filing of a fresh application.)
- ('17) AIR 1917 Low Bur 179 (179) : 8 Low Bur Rul 300. (Refusal to execute a decree against a partner obtained against a firm.)
4. ('02) 25 Mad 545 (545).
- ('16) AIR 1916 Cal 471 (472).
- (1900) 27 Cal 670 (672).
- ('22) AIR 1922 Lah 396 (397).
- ('38) AIR 1938 Mad 78 (79).
- ('17) AIR 1917 Mad 605 (606, 607).
- ('17) AIR 1917 Mad 293 (294) : 40 Mad 299. (Order recognising assignment and allowing execution is a decree.)
- ('15) AIR 1915 Mad 1138 (1140).
- ('10) 6 Ind Cas 199 (199) (Mad).
- ('02) 25 Mad 383 (385).
- ('25) AIR 1925 Pat 449 (450) : 4 Pat 120.
- [See ('68) 10 South W R 144 (145).]
- [But see ('35) AIR 1935 Lah 609 (610). (Reversing AIR 1934 Lah 51 (52).]
5. ('25) AIR 1925 All 578 (579) : 47 All 865.
- ('26) 98 Ind Cas 783 (783) (Mad).
6. ('04) 8 Cal W N 575 (577).
- [But see ('10) 8 Ind Cas 168 (171) : 35 Bom 103.
7. ('26) AIR 1926 Mad 834 (835).
- ('24) AIR 1924 Mad 365 (366).
- ('08) 7 Cal L Jour 270 (272).
- ('78) 4 Cal L Rep 27 (28).
- ('25) AIR 1925 Pat 484 (485).
8. ('05) 9 Cal W N 972 (972).
- ('34) AIR 1934 Nag 82 (82, 83) : 30 Nag L R 135.
- ('76) 1 All 668 (669, 675) : 5 Ind App 87 (PC). (Appeal from order misconstruing a decree lies.)
- ('09) 1 Ind Cas 78 (78) (All). (Order under S. 63.)
- ('33) AIR 1933 Bom 185 (186).
- ('17) AIR 1917 Cal 182 (182). (Order under S. 63.)
- ('14) AIR 1914 Cal 828 (829) : 41 Cal 418.
- ('97) 24 Cal 473 (487, 489).
- ('20) AIR 1920 Lah 117 (118).
- ('26) AIR 1926 Oudh 193 (194).
- ('17) AIR 1917 Oudh 96 (99).

9. A question relating to the enforcement of reliefs granted by a decree.<sup>9</sup>
10. An order for arrest of, or an order refusing to arrest, or an order deciding the legality or otherwise of the arrest of a judgment-debtor.<sup>10</sup>
11. An order enforcing a decree under O. 21 R. 32.<sup>11</sup>
12. A question relating to restitution of property or refund of money.<sup>12</sup>
- [There, however, seems to be a conflict of decisions on this point. See Section 144 Note 33.]
13. An order deciding whether anything is due under a decree.<sup>13</sup>

(65) 11000th Cas 11 (12), (order under s. 63).  
(72) AIR 1923 Pat 121 (131).  
(70) AIR 1920 Sind 11 (12) : 13 Sind L R 210.  
9. (92) AIR 1927 Cal 111 (112) : 51 Cal 521.  
(Unreversed decree for possession — Fresh suit.  
(22) AIR 1922 Pat 407 (107) : 1 Pat 127 (10).  
(21) AIR 1921 Pat 329 (322) : 10 Pat 170 (10).  
(96) 1896 All W N 69 (70).  
(88) 1888 All W N 200 (231), (Decree declaring main name must be entered in execution.)  
(78) 2 Bom 191 (197), (Do.).  
(98) 26 Cal 111 (117), (Do.).  
(97) 19 Cal 139 (140) (141), (Do.).  
(72) 15 Sup W R 128 (129), (Do.).  
(89) 12 Mad 1-3 (146), (Do.).  
(87) 9 All 33 (31), (Decree declaring in substance must be entered in execution — Insubstantial remittance by payment of a fixed rate of interest, stands exactly on the footing of a decree order — Payment by instalments.)  
(87) 1887 All W N 193 (199).  
(22) AIR 1922 Bom 350 (351) : 16 Bom 256. (Working out rights in partition decree).  
(93) 5 Bom L R 618 (620), (Do.).  
(26) AIR 1926 Outh 230 (231), (Do.).  
(11) 9 Ind Cas 1031 (1037) (Cal).  
(99) 1899 Pun Re No. 21.  
(66) 29 Mad 151 (152).  
(70) 6 Mad H C R 13 (14, 15).  
(25) AIR 1926 Nag 239 (240).  
(31) AIR 1931 Pat 236 (238).  
(87) 1 Bom 105 (110), (Decree should contain directions for paying future maintenance.)  
[But see (91) 16 All 179 (181), (Decree did not fix any time for payment of future maintenance — Separate suit maintainable.)]  
10. (99) 3 Ind Cas 46 (46, 47) : 32 All 3. (Order for arrest.)  
(21) AIR 1921 Pat 360 (360), (Do.).  
(35) AIR 1935 All 361 (366).  
(37) AIR 1937 Pat 706 (707).  
(22) AIR 1922 Pat 259 (259), (Refusing to arrest.)  
(19) AIR 1919 Pat 15 (16) : 1 Pat 77, (Do.).  
(96) 1896 Pun Re No. 69, page 398. (Order for arrest.)  
(24) AIR 1924 Mad 900 (900), (Deciding legality of arrest.)  
(17) AIR 1917 Mad 187 (187), (Do.).  
(10) 5 Ind Cas 909 (910) (Mad) (Do.).  
(98) 21 Mad 29 (30), (Do.).  
(36) AIR 1986 Rang 367 (367).  
[But see (29) AIR 1929 Rang 161 (161) : 7 Rang 110. (If objection is not taken and decided there does not take it out of the purview of S. 47.)]  
(13) (1900) 22 All 248 (246).  
(96) 3 Cal L Jour 276 (279).  
(25) AIR 1925 Cal 918 (919), (Claim for interest omitted in execution application.)  
(36) AIR 1936 Pat 725 (727), (That the application purports to be one under S. 151, O. P. C. does not take it out of the purview of S. 47.)  
11. (19) AIR 1919 Cal 671 (672) : 46 Cal 103.  
(11) AIR 1911 All 105 (106).  
(31) AIR 1931 Pat 179 (180, 181), (Decree for specific performance of sale — No expiry of time for delivery of possession in decree — Execution Court can order possession as incidental relief.)  
[See also (67) 7 Sup W R 372 (373).]  
12. (66) 28 Mad 375 (376).  
(33) AIR 1933 All 129 (130, 131).  
(95) 8 Mad L Jour 279 (277).  
(23) AIR 1924 All 391 (396) : 15 All 369 (371).  
(Order for possession under S. 151, O. P. C.).  
(31) AIR 1931 Cal 779 (781), (Do.).  
(22) AIR 1922 All 150 (150).  
(91) 1901 All W N 53 (55), (If fund of money taken by decree-holder under S. 47, decree annulled.)  
(67) 21 All 291 (293, 294), (Refund of sale proceeds to auction-purchaser from decree-holder on finding of sale void).  
(31) 10 Cal L Rep 573 (576, 577), (Sale by decree-holder for money refunded to auction-purchaser — Involuntary of judgment-debtor — Barred by this Section.)  
(37) AIR 1937 Mad 779 (781), (Stranger auction-purchaser applying for refund of purchase-money on setting aside of sale — Appeal and second appeal lie from order on such application.)  
(31) AIR 1931 Mad 558 (559, 560), (Recitation of facts does not include a removal of objection to possession put up by auction-purchaser to original decree).  
(12) 14 Ind Cas 536 (536) (Mad).  
(39) AIR 1939 Nag 101 (102), (Decree annulled applying for refund of surplus left after satisfying decree).  
(23) AIR 1923 Outh 16 (17, 18).  
[See (65) 11 Cal 362 (365).]  
[But see (30) AIR 1930 Bom 132 (134) : 51 Bom 162, (Claim for refund of money paid under a decree on ground of subsequent events — S. 47 no bar.)]  
(17) AIR 1917 Mad 217 (217), (Refund of poundage fee to third party auction-purchaser under O. 21 R. 93 — Not a question under this Section.)  
13. (1900) 22 All 248 (246).  
(96) 3 Cal L Jour 276 (279).  
(25) AIR 1925 Cal 918 (919), (Claim for interest omitted in execution application.)  
(36) AIR 1936 Pat 725 (727), (That the application purports to be one under S. 151, O. P. C. does not take it out of the purview of S. 47.)

19. A question as to discharge of a receiver.<sup>19</sup>
20. Enquiry regarding substituted share of judgment-debtor's property or accretions to his property.<sup>20</sup>
21. Questions relating to the enforcement of security or relating to orders requiring security under O. 41 R. 5.<sup>21</sup>
22. As to questions under O. 21 R. 71 and Section 73, see those Sections.
23. As to application by decree-holder purchaser for refund of purchase money where the sale is set aside in a separate suit, see Note 4 to O. 21 R. 93.
24. Questions as to the absence of or irregularity in the attachment of the property to be sold.<sup>21a</sup>
25. Question relating to payments by instalments under O. 20 R. 11 as amended in Madras, Nagpur and Rangoon.<sup>21b</sup>
26. Question whether an instalment decree is executable in its entirety by reason of default in payments.<sup>21c</sup>

The following have been held to be *questions not relating to execution, discharge or satisfaction of the decree*—

1. An order made by a Court exercising a power given to it by a provision in a scheme framed in a scheme suit.<sup>22</sup>
2. Questions relating to the rights of a third party subrogated to the rights of a mortgagee decree-holder by payment at the instance of the mortgagor.<sup>23</sup>
3. A mortgagor's right to possession as against the mortgagee who is entitled under a decree to be in possession till his debt is paid off.<sup>24</sup>
4. An objection by a prior mortgagee to the sale of the mortgaged property in execution of puisne mortgagee's decree.<sup>25</sup>
5. The enforcement of a right under a decree which merely *declares* it.<sup>26</sup>

19. ('18) AIR 1918 Pat 60 (61) : 3 Pat L Jour 513. (Receiver appointed during execution proceedings.)

('80) 5 Bom 45 (48). (Receiver for management of estate appointed by a decree.)

20. ('22) AIR 1922 P C 54 (55) : 1 Pat 378 : 49 Ind App 139 (PC).

('17) AIR 1917 Pat 253 (257) : 2 Pat L Jour 496.

('25) AIR 1925 P C 86 (88) : 52 Ind App 137 : 49 Bom 233 (PC). (Accretions.)

('29) AIR 1929 Oudh 263 (264, 265).

('17) AIR 1917 Pat 126(127,128):3 Pat L Jour 339.

21. ('18) AIR 1918 Mad 442 (442) : 41 Mad 327.

('30) AIR 1930 Pat 108 (109, 110) : 8 Pat 801 : (AIR 1919 P C 55, Foll.)

('82) 8 Cal 477 (478).

('34) AIR 1934 Rang 231 (232). (Obiter.)

21a. ('30) AIR 1930 Mad 414 (415).

21b. ('26) AIR 1926 Rang 192 (192) : 4 Rang 247.

('32) AIR 1932 Rang 54 (55).

21c. ('29) AIR 1929 Lah 390 (391).

22. ('25) AIR 1925 P C 155 (156) (PC).

('26) AIR 1926 Bom 130 (130).

('26) AIR 1926 Bom 167 (167). (Power exercised by District Judge as persona designata.)

('27) AIR 1927 Mad 1110 (1110).

[See ('38) AIR 1938 Rang 363 (364). (Orders passed merely for carrying out a scheme are orders in execution and appealable under S. 47.—AIR 1925 P C 155, Distinguished.)]

[But see ('14) AIR 1914 Low Bur 226 (228).]

23. ('25) AIR 1925 Mad 129 (130, 131).

('05) 27 All 400 (402).

('05) 27 All 325 (332, 333) : 32 Ind App 128 (PC).

('22) AIR 1922 Lah 358 (360).

[See ('32) AIR 1932 All 49 (50). (Questions as to priority of mortgages more for suits than for execution proceedings.)]

[See also ('09) 1 Ind Cas 744 (744) : 31 All 364.]]

[But see ('10) 5 Ind Cas 142 (143) : 37 Cal 282.

(But the rights of a prior mortgagee-defendant getting subrogated must be decided in execution.)]

24. ('16) AIR 1916 Cal 43 (44). (Mortgagee in possession in pursuance of a decree for ejectment—Suit for redemption not barred by S. 47.)

('98) 20 All 506 (510).

('04) 6 Bom L R 1100 (1101).

('75) 12 Bom H O R 160 (162).

25. ('27) AIR 1927 Mad 431 (432).

('25) AIR 1925 Nag 185 (185, 186).

26. ('14) AIR 1914 All 103 (103, 104). (Declaration that defendant must vacate when plaintiff desires.)

('28) AIR 1928 Bom 365 (366).

('36) 164 Ind Cas 921 (925) (Cal).

[See also ('06) 28 All 72 (73). (Decree-holder making construction in excess of decree—Application for demolition under S. 47 does not lie.)

('05) 2 All L Jour 573 (575). (Do.)]

See also the undermentioned cases.<sup>27</sup>

27. ('11) 9 Ind Cas 828 (829) (Lah). (Order of Court staying issue of warrant of attachment on judgment-debtor's representation that he would pay the amount within a particular time.)
- ('39) AIR 1939 Pat 248 (249). (Partition decree among co-sharers giving plaintiff right to realize certain rents—Another co-sharer collecting it—Separate suit for such rent is not barred.)
- ('69) 13 Moo Ind App 69 (76) (P C). (Claim for damages in respect of property purchased.)
- ('37) AIR 1937 All-635 (636). (Decision of a claim in accordance with O. 38 R. 8 is not one under S. 47.)
- ('29) AIR 1929 All 666 (666). (Extending time fixed by a decree.)
- ('14) AIR 1914 All 440 (441). (Suit for declaration of title under a prior decree for pre-emption.)
- (1900) 1900 All W N 135 (136). (Decree for possession—Judgment-debtor not allowed to set up claim for maintenance in execution proceedings.)
- ('95) 17 All 243 (244). (Order striking off execution but maintaining attachment.)
- ('39) AIR 1939 Bom 182 (183). (An order refusing to direct the value of the property to be stated in the sale proclamation under O. 21 R. 66 is not a decree under S. 47 and is not appealable.)
- ('31) AIR 1931 Bom 295 (296, 297). (Extraneous terms forming consideration for a compromise decree—Executable.)
- ('39) AIR 1939 Cal 334 (335). (Court receiving notice, after sale, under the Bengal Agricultural Debtors Act—Question whether sale should be set aside is one under S. 47.)
- ('37) AIR 1937 Cal 211 (212) : I L R (1937) 1 Cal 781. (An objection by the judgment-debtor that a scheme sanctioned by the Court under S. 153 of the Companies Act has superseded the decree which has, therefore, become incapable of execution, relates to the execution or discharge of the decree and consequently comes within S. 47.)
- ('36) 164 Ind Cas 802 (803) (Cal). (Where the execution proceedings taken in the Civil Court in pursuance of an award under the Co-operative Societies Act are set aside, and the Court passes an order under S. 151, Civil P. C., remitting the award to the arbitrator for rectification of certain errors therein, the order is not one falling under S. 47.)
- ('33) AIR 1933 Cal 668 (672): 60 Cal 801. (Trusts—Creditor of trustee—Right of subrogation to trustee's right of indemnity can be decided in suit by creditor against trustee, but not in execution.)
- ('25) AIR 1925 Cal 286 (288). (Enforcement of provisions in a compromise decree extraneous to the subject-matter of suit is by separate suit though such provisions form consideration for compromise.)
- ('19) AIR 1919 Cal 806 (807). (Order merely allowing a payment directed by the decree.)
- ('13) 19 Ind Cas 904 (905) (Cal). (Order allowing decree-holder to withdraw execution proceedings.)
- ('12) 16 Ind Cas 543 (545) (Cal). (Application by minor after majority to set aside sale on the ground of negligence of guardian.)
- ('08) 7 Cal L Jour 436 (438). (Refusal to grant sale certificate.)
- ('06) 4 Cal L Jour 211 (219). (Question whether a person has acquired a valid title in sale.)
- (1900) 4 Cal W N 39 (40). (Order on an application for review of an order dismissing an execution case for non-payment of process fees.)
- ('23) AIR 1923 Pat 180 (183). (Do.)
- ('99) 26 Cal 529 (531). (Order amending a sale certificate.)
- ('97) 20 Mad 487 (489). (Do.)
- ('39) AIR 1938 Lah 214 (215, 216). (Application for temporary alienation of judgment-debtor's land—Mortgage created and mortgagee given possession though he had not paid the money—Decree recorded as fully satisfied by mortgage—Subsequent suit by decree-holder against mortgagee for the money not barred, as question was not one relating to execution, discharge or satisfaction of decree.)
- ('38) AIR 1938 Lah 4 (5). (Amendment of decree under Ss. 151 and 152.)
- ('27) AIR 1927 Lah 337 (337). (Order setting aside confirmation of sale.)
- ('24) AIR 1924 Lah 405 (407). (Infringement of rights declared by a decree—S. 47 does not apply.)
- ('18) AIR 1918 Lah 63 (63): 1918 Pun Re No. 43. (Order amending a decree.)
- ('14) AIR 1914 Lah 24 (25): 1914 Pun Re No. 12. (Suit against prior mortgagee for redemption and for possession against mortgagor decreed in favour of subsequent mortgagee—Subsequent suit for possession against mortgagor on the ground that redemption money had been paid not barred—S. 47.)
- ('07) 1907 Pun Re No. 5, page 30. (S. 47 bars a regular suit where question relating to execution is raised bona fide.)
- ('39) AIR 1938 Mad 307 (313). (Decree in partition suit not engrossed on proper non-judicial stamp—Decree-holder applying to executing Court for having decree engrossed on proper stamp—Order of executing Court is not one under S. 47.)
- ('36) AIR 1936 Mad 733 (742, 743). (Question of paramount title cannot be raised in proceedings for execution of mortgage decree.)
- ('28) AIR 1928 Mad 296 (297). (Application by plaintiff for payment of money deposited by petitioner when applying for setting aside ex parte decree.)
- ('22) AIR 1922 Mad 63 (63). (Decree-holder selling his own property by bona fide mistake—Remedy is by separate suit.)
- ('18) AIR 1918 Mad 914 (915). (Refusal of an application for cheque.)
- ('08) 31 Mad 37 (39, 40). (Claim for damages in respect of property purchased.)
- ('30) AIR 1930 Nag 199 (200) : 26 Nag L R 187. (Landlord acquiring the interest of judgment-debtor under S. 6, C. P. Tenancy Act, was held not to represent the judgment-debtor within the meaning of S. 47.)
- ('23) AIR 1923 Nag 327 (328). (Whether crops passed in a pre-emption decree which was silent about this.)

**72. "Shall be determined by the Court executing the decree and not by a separate suit."** — All objections that can be raised in execution under this Section "shall be determined by the Court executing the decree and not by a separate suit."<sup>1</sup> The words "by a separate suit" have given rise to a conflict of decisions as to whether the bar of suit applies only where the questions are raised by a party *as plaintiff* in a suit, or whether it applies to such questions raised in *defence* to a suit as well. The High Court of Calcutta has held that the Section bars a plea in *defence* also on the ground that the words "shall be determined by the Court executing the decree" give *exclusive jurisdiction* over the matter to the Court executing the decree, and cannot be merely construed to mean that the executing Court must determine it *if it is raised* in the course of execution proceedings.<sup>2</sup> But it has been also held by that High Court that where the defendant has been kept out of knowledge of the execution proceedings, until after the suit has been brought, by the fraud of the decree-holder, he could raise such objections by way of defence to the suit.<sup>2a</sup>

The High Court of Madras has, on the other hand, held that the bar is not applicable to pleas in defence.<sup>3</sup> It has followed the undermentioned case of the Calcutta High Court<sup>4</sup> which held that the words "by a separate suit" cannot be taken to mean "in a separate suit." In view of the fact, however, that the said case of the Calcutta High Court has been overruled by a later Full Bench of that Court,<sup>5</sup> the Madras decisions will have to be reconsidered.

It has been held that a plea that a suit is barred under this Section cannot be raised for the first time in appeal when it has not been raised in the first Court.<sup>6</sup>

**73. "Determined," meaning of.** — The word "determined" shows that the questions contemplated by the Section are to be *finally* disposed of and the effect of the word is therefore to give the Court executing the decree jurisdiction to dispose of finally such questions by granting appropriate relief.<sup>1</sup>

**74. "Court executing the decree," meaning of.** — "The Court executing the decree" means only the Court executing the decree *at the time when the*

('29) AIR 1929 Oudh 309 (310). (Application for withdrawal of money in Court was treated as application for execution.)

('39) AIR 1939 Pat 242 (243). (Decree-holder attaching surplus profits of ghatwal estate raising objections to certain items in the estimate of receipts and expenditure of the estate — Order passed on objections is appealable.)

('23) AIR 1923 Pat 44 (44, 45). (Question of contribution as between defendants in a mortgage suit.)

('38) AIR 1938 Rang 292 (293). (Application under O. 21 R. 22 falls under this Section.)

#### Note 72

1. ('15) AIR 1915 P C 88 (89) (P C).

('33) AIR 1933 Mad 825 (833) : 57 Mad 49. (Section is mandatory—Court has no discretion to refer parties to a suit in respect of a matter falling under the Section.)

('71) 3 N W P H C R 62 (63).

('31) AIR 1931 Bom 114 (118).

('20) AIR 1920 Cal 537 (538).

('01) 28 Cal 492 (495, 496).

('02) 1902 Pun Re No. 8 page 30.

('33) AIR 1933 Mad 340 (341). (Party to suit cannot evade this rule by joining with a stranger.)

('33) AIR 1933 Mad 166 (167) : 56 Mad 447. (When once the Court finds that resort to S. 47 is the proper remedy it has no option but to decide; it cannot refer the parties to a suit.)

('31) AIR 1931 Rang 117 (121) : 9 Rang 305 (FB).

2. ('29) AIR 1929 Cal 374 (379) : 57 Cal 403 (FB). (Overruling 24 Cal 355; 26 Cal 946; 7 C W N 67; 4 Ind Cas 168; AIR 1922 Cal 311. (The decision in AIR 1929 Cal 247 to the contrary must also be considered to be no longer law.)

('27) AIR 1927 Cal 106 (108) : 53 Cal 837.

('32) AIR 1932 All 49 (49).

('31) AIR 1931 Nag 27 (28, 29).

[See also ('11) 10 Ind Cas 90 (93) (Cal).

('10) 7 Ind Cas 457 (458) (Bom). (Judgment-debtor not allowed to raise objection to sale by way of defence to suit.)]

2a. ('32) AIR 1932 Cal 825 (827) : 59 Cal 1242.

('29) AIR 1929 Cal 247 (249) : 56 Cal 467.

3. ('21) AIR 1921 Mad 279 (280).

('09) 1 Ind Cas 221 (222, 226) : 32 Mad 242.

('09) 1 Ind Cas 193 (194) (Mad).

4. ('97) 24 Cal 355 (357).

5. ('29) AIR 1929 Cal 374 (379) : 57 Cal 403 (FB).

6. ('36) 161 Ind Cas 43 (45) (Nag).

#### Note 73

1. ('14) AIR 1914 Mad 91 (93).

*application is made.* Therefore, it does not include the Court which has executed the decree and has thereby become *functus officio*,<sup>1</sup> or an Appellate Court.<sup>2</sup> A Collector executing a decree transferred to him is not a "Court executing a decree" within the meaning of this Section.<sup>3</sup> The Court which sends the decree to the Collector remains "the Court executing the decree" and hence a question coming under this Section can be entertained by such Court even after the decree has been transferred to the Collector for execution.<sup>4</sup> The words "the Court executing the decree" do not restrict the applicability of the Section to proceedings initiated by the decree-holder. The Section also applies to proceedings initiated by the judgment-debtor.<sup>5</sup> See also Note 2 to Section 70, *infra*.

**75. Powers of the executing Court.** — See Notes to Section 38 generally.

**76. Power to construe decree.** — Where there is no ambiguity in the terms of a decree the Court is bound to interpret it according to its plain meaning and cannot ignore its terms or assume mistake on the part of the parties.<sup>1</sup> Where, however, there is any *ambiguity* in the decree, the executing Court may, and should, construe the decree in order to ascertain its precise meaning<sup>2</sup> and, for this purpose, it may refer to the judgment and the pleadings in the case.<sup>3</sup> In construing an appellate decree, the pleadings and the decree of the *trial* Court may be referred to,<sup>4</sup> but not the statements in the judgment of the first Court which are not based on pleadings.<sup>5</sup> See also Note 9 to Section 38, *ante*.

**77. Rules of construction of decree.** — There is no general rule for construing decrees; each case depends on itself.<sup>1</sup> The following general principles may, however, be found useful in interpreting decrees —

1. A decree should be construed in accordance with law.<sup>2</sup> Where, therefore,

#### Note 74

1. ('84) 10 Cal 538 (540).  
(1900) 23 Mad 377 (380). (Includes applications made by the judgment-debtor.)  
(71) 6 Mad II C R 304 (306).
2. ('15) AIR 1915 Mad 41 (41).  
(05) 29 Bom 71 (73).
3. ('25) AIR 1925 All 146 (149) : 47 All 217.  
(38) AIR 1938 Oudh 188 (189).
4. ('38) AIR 1938 Oudh 188 (189).
5. (1900) 23 Mad 377 (380, 382).

#### Note 76

1. ('10) 6 Ind Cas 75 (76) (All).  
(16) AIR 1916 All 207 (208).  
(23) 77 Ind Cas 167 (168, 169) (Cal).  
(18) AIR 1918 Cal 245 (246).  
(17) AIR 1917 Cal 288 (289).
- (30) AIR 1930 Lah 589 (591). (Wording of the decree clear—Decree cannot be interpreted in the light of the reasoning or phraseology in the judgment.)  
(25) AIR 1925 Lah 470 (471).  
(24) AIR 1924 Lah 696 (698).
- (18) AIR 1918 Mad 1287 (1292) : 40 Mad 259 (FB).
2. ('30) AIR 1930 Mad 688 (690) : 53 Mad 750.  
(24) AIR 1924 All 690 (690).  
(07) 9 Bom L R 1361 (1362).  
(87) 16 Bom 659 (661) (F B).
- (84) 10 Cal 1092 (1094). (But where terms of decree are uncertain, any inquiry or evidence in execution to ascertain the same is barred.)

- (30) AIR 1930 Mad 688 (690) : 53 Mad 750.
- (30) AIR 1930 Oudh 302 (303). (The question whether a decree is or is not a purely declaratory decree can only be decided by examination of the decree itself.)  
(98) 1 Oudh Cas 22 (27).
3. ('21) AIR 1921 Cal 699 (700).  
(31) AIR 1931 Cal 511 (513).  
(31) AIR 1931 Mad 328 (331) : 54 Mad 532.  
(35) AIR 1935 Oudh 39 (40, 41) : 10 Luck 416.  
(30) AIR 1930 Oudh 366 (367).  
(30) AIR 1930 Pat 536 (538) : 9 Pat 499.  
(29) AIR 1929 Pat 746 (747).  
(21) AIR 1921 Pat 360 (362).
4. ('20) AIR 1920 Pat 192 (194).
5. ('12) 14 Ind Cas 130 (131) (Oudh).

#### Note 77

1. ('19) AIR 1919 All 297 (298) : 41 All 473.
2. ('11) 12 Ind Cas 123 (126) : 35 Mad 560.  
(21) 65 Ind Cas 224 (224) (Pat).  
(24) AIR 1924 P C 133 (135) : 51 Ind App 236 : 48 Bom 404 (PC). (Decree for possession on payment of a certain amount within a time fixed—Deposit in Court by a mortgagee from the plaintiff—Deposit enures to the benefit of all parties interested in the fulfilment of the condition imposed by the decree.)
- (24) AIR 1924 Cal 778 (778) : 51 Cal 320. (Decree for value of bills of exchange stated in sterling—Decretal amount in rupees is to be calculated as per rate of exchange on the date the bills matured.)

the judgment admits of two meanings, it is wrong to construe it in a way which violates both law and equity.<sup>3</sup>

2. Where the decree is consistent with either of two inconsistent views, that interpretation which is in conformity with the *judgment* should be adopted.<sup>4</sup>

3. A construction which may, in future, result in a multiplicity of suits, should be avoided.<sup>5</sup>

4. A decree must be construed in a fair and reasonable way so as to accelerate its execution<sup>6</sup> and the benefit of the doubt ought to go to the judgment-debtor.<sup>7</sup>

5. In cases of conflicting descriptions of property in the decree, applicable to two different sets of facts, that which is certain, stable, and the least likely to have been mistaken, must prevail.<sup>8</sup>

6. The interpretation to be put upon a consent decree ought to be the same as that to be placed on the original agreement between the parties.<sup>9</sup>

6a. Similarly a decree passed on the basis of an award should be construed in the light of the award.<sup>9a</sup>

7. Where a decree is passed in favour of A conditional on his paying into Court a certain sum of money "within 30 days of the decree becoming final," a payment made within the time extended by Section 12 of the Limitation Act, but after the expiry of 30 days from the decree, is within time.<sup>10</sup> Similarly, where the decree directs A to pay a certain sum to another within a certain time as a condition precedent to recovery of possession, the payment made within the same period from the date of the *appellate* decree is valid.<sup>11</sup>

8. A direction that the defendant "do pay a certain sum of money" imposes *prima facie* a personal liability on the defendant,<sup>12</sup> though, no doubt, the words are not conclusive of the question.<sup>12a</sup>

9. A decree must be construed as a whole.<sup>13</sup>

#### 78. Power to go behind decree. — See Note 8 to Section 38 and Note 29 *ante*.

('21) AIR 1921 Lah 42 (43) : 2 Lah 155. (Possession to be given in case of default—Option not limited to first default.)

('23) AIR 1923 Oudh 241 (241) : 26 Oudh Cas 59. (When under a decree, the contractual rate of interest ceases to be payable at a given date and the court rate is substituted for it therefrom up to the date of realization, the court rate will be chargeable on the whole amount due with interest at the contractual rate up to that given date.)

('21) AIR 1921 Oudh 108 (109, 110) : 24 Oudh Cas 209. (Where a decree awarded mesne profits but did not specify that they were future profits the decree must be intended to give with possession those mesne profits claimable by law up to the time of possession.)

('12) 16 Ind Cas 866 (866) (Oudh). (Do.)

('36) AIR 1936 Pat 303 (305). (Decree against puisne mortgagee in suit by prior mortgagee not to be interpreted to be a personal decree against the puisne mortgagee.)

3. ('21) 60 Ind Cas 345 (346) (Lah).

4. ('10) 5 Ind Cas 496 (496) : 32 All 321.

('13) 20 Ind Cas 827 (828) (Mad).

('23) AIR 1923 Cal 704 (704).

('17) AIR 1917 Cal 288 (289).

5. ('22) AIR 1922 Oudh 34 (36).

('30) AIR 1930 Oudh 302 (303).

6. ('20) AIR 1920 Pat 192 (193).

('33) AIR 1933 Cal 329 (331) : 60 Cal 794. (Court will lean against a construction which renders a decree inexecutable.)

[See also ('31) AIR 1931 Cal 476 (478).]

7. ('21) AIR 1921 Oudh 138 (138).

8. ('14) AIR 1914 Oudh 280 (281) : 17 Oudh Cas 256.

9. ('11) 9 Ind Cas 875 (880) (Mad).

9a. ('33) AIR 1933 Lah 505 (506).

('31) AIR 1931 Cal 511 (513).

10. ('17) AIR 1917 All 325 (325) : 39 All 193.

11. ('14) AIR 1914 Bom 132 (134) : 39 Bom 175.

12. ('11) 12 Ind Cas 689 (690) (Mad).

('11) 12 Ind Cas 184 (185) (Mad).

('29) AIR 1929 Mad 105 (108, 109) : 52 Mad 263. (Costs decreed against Official Receiver—Personally liable.)

12a. ('11) 12 Ind Cas 689 (689) (Mad).

('34) AIR 1934 Oudh 45 (47). (Benefit of doubt to be given to judgment-debtor.)

13. ('29) AIR 1929 Sind 98 (101) : 23 Sind LR 375.



mistake in the initiation of proceedings<sup>2</sup> and to avoid a valid claim being defeated on technical pleas.<sup>2a</sup> See also the undermentioned case.<sup>2b</sup> But it is not intended to save litigants from the trouble of choosing the proper forum and filing a plaint or an execution petition when it is discovered, in time, what is the proper forum and there is no further question about the matter.<sup>2c</sup> A proceeding cannot, however, be treated *both* as a suit as well as an application.<sup>3</sup>

The power under this Section is *discretionary* and may be exercised according to the circumstances of each case.<sup>4</sup> But two essential conditions must be satisfied before the Court can exercise its discretion and treat a suit as an application —

1. The Court in which the suit is brought must have *jurisdiction to execute the decree*,<sup>5</sup> and

(12) 13 Ind Cas 204 (205) (Mad).  
 ('10) 6 Ind Cas 776 (776) (Mad).  
 ('09) 1 Ind Cas 380 (381) (Mad).  
 ('23) AIR 1923 Nag 94 (95).  
 ('30) AIR 1930 Oudh 468 (470).  
 ('38) AIR 1938 Pat 216 (220).  
 ('36) AIR 1936 Pat 303 (305).  
 ('16) AIR 1916 Pat 299 (300) : 1 Pat L Jour 48.  
 [See also ('03) 5 Bom L R 1036 (1041).]  
 2. ('15) AIR 1915 Mad 226 (227).  
 ('31) AIR 1931 Mad 588 (590).  
 2a. ('23) AIR 1923 Nag 94 (95).  
 2b. ('36) AIR 1936 Bom 227(231): 60 Bom 516.  
 2c. ('31) AIR 1931 Mad 270 (271).  
 3. ('15) AIR 1915 Mad 226 (227).  
 4. *In the following cases suits were in the discretion of the Court allowed to be treated as proceedings :—*  
 ('07) 29 All 348 (350, 351).  
 (1900) 22 All 121 (123).  
 ('38) AIR 1938 Cal 113 (115) : I L R (1938) 1 Cal 280.  
 ('35) AIR 1935 Cal 15 (17). (Suit for setting aside court sale in respect of properties not included in the mortgage.)  
 ('27) AIR 1927 Cal 614 (615): 54 Cal 419. (Purchaser in execution of mortgage-decree — Title questioned—Application under S. 47 and not suit is the remedy—Suit can be treated as a proceeding.)  
 ('05) 32 Cal 332 (333).  
 ('19) AIR 1919 Lah 430 (431, 432).  
 ('07) 1907 Pun Re No. 5, p. 30.  
 ('32) 35 Mad L W 103 (104). (Dismissal of prior execution petition is no bar for treating suit as proceeding.)  
 ('30) AIR 1930 Mad 12 (13, 14).  
 ('16) AIR 1916 Mad 429 (429).  
 ('14) AIR 1914 Mad 91 (92).  
 ('10) 6 Ind Cas 776 (776) (Mad). (Where a suit is barred under S. 244, Civil P. C., the plaint may be treated as an application under that Section.)  
 ('09) 1 Ind Cas 380 (381) (Mad). (Plaint covering a question under S. 47, Civil P. C., may be treated as an execution petition.)  
 ('22) AIR 1922 Nag 198 (199). (Suit for restitution which is barred under S. 144.)  
 [See ('16) AIR 1916 Pat 299 (300): 1 Pat L Jour 43.]

*In the following cases, a proceeding was allowed to be treated as a suit :—*

(26) AIR 1926 All 387 (388): 48 All 362. (Decree against a minor—Objection by the minor that the decree was not binding on him in execution proceedings by an application — Proceeding on the objection may be treated as suit.)  
 ('12) 16 Ind Cas 543 (545) (Cal). (Do.)  
 ('38) AIR 1938 Lah 177 (178). (Partition proceedings—Award declaring rights of parties without giving possession—Decree on award — Application for execution claiming possession with alternative prayer to treat application as a suit.)  
 ('13) 18 Ind Cas 700 (700) (Lah).  
 ('31) AIR 1931 Mad 81 (83).  
 ('25) AIR 1925 Pat 16 (17): 3 Pat 344. (Proceedings in execution between rival assignees of decree regarded by Court as suit.)  
*In the following cases the Court refused to act under the Section :—*  
 ('13) 19 Ind Cas 622 (623, 624): 35 All 243.  
 ('09) 3 Ind Cas 495 (496) (All).  
 ('04) 1 All L Jour 61 (63).  
 (1900) 1900 All W N 196 (197).  
 ('19) AIR 1919 Cal 674 (676): 46 Cal 103.  
 ('24) AIR 1924 Mad 707 (708).  
 ('09) 4 Ind Cas 723 (724): 32 Mad 425.  
 ('31) AIR 1931 Oudh 45 (46): 6 Luck 452.  
 ('15) AIR 1915 Oudh 134 (135, 136).  
 5. ('10) 7 Ind Cas 55 (59) (Cal).  
 ('34) AIR 1934 All 699 (700). (Party to suit in Small Cause Court objecting to attachment of property in execution of decree in same Court—Objection dismissed and declaratory suit filed in Munsif's Court — Munsif's Court cannot treat suit as application under S. 47 and suit must be dismissed.)  
 ('16) AIR 1916 All 184 (186).  
 ('14) AIR 1914 Cal 691 (692).  
 ('95) 22 Cal 483 (486).  
 ('26) AIR 1926 Lah 165 (166): 7 Lah 1.  
 ('35) AIR 1935 Mad 923 (925).  
 ('20) AIR 1920 Mad 206 (207).  
 ('09) 4 Ind Cas 723 (724) : 32 Mad 425.  
 ('05) 28 Mad 64 (66).  
 ('99) 22 Mad 347 (349).  
 ('22) AIR 1922 Nag 189 (191).  
 ('21) AIR 1921 Nag 130 (131).  
 ('18) AIR 1918 Nag 102 (103).  
 ('95) 8 O P L R 3 (4).

2. the application should not have been barred by limitation at the date of the institution of the suit.<sup>6</sup>

The power exercisable under this sub-section may not only be exercised by the original Court, but also by the Appellate Court, subject, however, to the same two conditions, namely, that the original Court had jurisdiction to execute the decree<sup>7</sup> and that the suit was filed within the limitation period prescribed for applying under this Section.<sup>8</sup>

The discretion given under this sub-section must be exercised when the plaint or application is filed, and after the procedure has once been determined at that stage (subject to the usual control of an appellate or revisional Court) it cannot thereafter be altered.<sup>9a</sup> Hence, it has been held that where a claim suit has been filed and has proceeded to its conclusion, a Court in which an application for execution is subsequently filed cannot treat such suit as an *application* to take a step-in-aid of execution for the purpose of saving limitation in respect of the subsequent execution application.<sup>9b</sup>

Where an application falling under this Section is dismissed on the merits and the applicant then brings a suit for the same relief, the suit cannot be converted into an application under this Section, on its being contended that such suit is barred by this Section. The remedy of the aggrieved party was to have appealed against the decision dismissing his prior application.<sup>9c</sup>

Where a proceeding in execution is treated, under this Section, as a suit, the judgment-debtor who objects to the execution of the decree is in the position of a plaintiff and therefore he has to pay the court-fee due to the Government in respect of the suit.<sup>9</sup>

**83. Objection as to limitation, when to be considered.** — An objection as to limitation may be taken at any stage of the execution proceedings if the facts upon which the objection is based are patent upon the face of the record.<sup>1</sup>

See also Note 23 to Section 11.

**84. Appeal.** — Where an order amounts to a determination of a question between the parties and relating to the execution, discharge or satisfaction of the decree, it will be a decree within the meaning of Section 2 cl. (2) and is appealable as such under Section 96.<sup>1</sup> As to whether *every* such order is appealable, see Note 86,

('11) 10 Ind Cas 991 (992) : (1910) 1 Upp Bur Rul 66.

6. (1900) 22 All 376 (377).

('11) 11 Ind Cas 987 (989) : 35 Bom 452.

('27) AIR 1927 Cal 106 (108) : 53 Cal 837.

('11) 10 Ind Cas 417 (420) (Cal).

('37) AIR 1937 Mad 580 (580).

('25) AIR 1925 Mad 1198 (1200).

('18) AIR 1918 Mad 180 (182).

('17) AIR 1917 Mad 453 (453).

('30) AIR 1930 Oudh 468 (470). (Plaint treated as an execution application and as an application to take a step-in-aid.)

[See ('38) AIR 1938 Nag 534 (536).]

[But see ('21) AIR 1921 Bom 285 (289) : 45 Bom 174. (Suit was treated as application to set aside sale and application was held time barred.)]

7. ('95) 22 Cal 483 (485, 486).

[See ('05) 32 Cal 332 (336).]

(1900) 22 All 376 (377).

('27) AIR 1927 Cal 411 (411, 412) : 54 Cal 524.

('27) AIR 1927 Cal 106 (108) : 53 Cal 837.

('05) 28 Mad 64 (66).

8a. ('38) AIR 1938 Nag 534 (536).

8b. ('38) AIR 1938 Nag 534 (536).

8c. ('35) AIR 1935 Mad 923 (925).

9. ('34) AIR 1934 Pat 9 (11).

#### Note 83

1. ('16) AIR 1916 Pat 331 (333).

('35) AIR 1935 Cal 230 (231).

#### Note 84

1. ('12) 13 Ind Cas 365 (367) (Cal).

('33) AIR 1933 All 732 (733) : 55 All 983. (Order dismissing execution application is appealable.)

('36) AIR 1936 All 479 (480). (A decision that certain person is representative of the judgment-debtor is appealable.)

('35) AIR 1935 All 183 (184).

The question of the right to appeal under this Section does not depend upon who happens to be the appellant but upon the question whether or not the case falls within the Section; thus, if the conditions of the Section are satisfied, the auction-purchaser also will have a right to appeal.<sup>2</sup>

Where a decree of a Small Cause Court is sent for execution to a Court exercising original jurisdiction and an order is passed under this Section, such an order is appealable.<sup>3</sup> But no *second appeal* will lie against an order in execution under this Section, where the suit is of a nature cognisable by a Court of Small Causes.<sup>4</sup> In the case of arbitration proceedings, the award must be considered to be a decree in a suit

- (1933) AIR 1933 All 201 (202) : 55 All 235. (Decree for possession—Decision on question between decree-holder and transferee pendente lite from judgment-debtor as to right to possession is a decree.)
- (1933) AIR 1933 All 57 (59) : 54 All 1031. (Decision on question under O. 21 R. 98 between plaintiff and exonerated defendant appealable as a decree.)
- (1932) AIR 1932 All 49 (49). (Even if order is not strictly within S. 47 if Judge purports to act under this Section, it would be appealable.)
- (1924) AIR 1924 Mad 518 (519). (Do.)
- (1906) 23 Mad 127 (129). (Do.)
- (1925) AIR 1925 All 551 (552).
- (1938) AIR 1938 Cal 236 (237).
- (1939) AIR 1939 Cal 334 (335). (Order purporting to be one under S. 151 but one which ought to be made under S. 47—Appeal lies.)
- (1937) AIR 1937 Cal 259 (259) : I L R (1937) 2 Cal 137. (Order dismissing execution petition for failure to comply with directions of Court—Second appeal lies.)
- (1925) AIR 1925 Cal 318 (319).
- (1918) AIR 1918 Cal 551 (552). (Such an order passed even on review is appealable as a decree.)
- (1910) 5 Ind Cas 483 (484) (Cal). (Do.)
- (1915) AIR 1915 Cal 137 (138).
- (1918) 20 Ind Cas 874 (875, 876) (Cal). (Question of agreement to give time to judgment-debtor for delivery of possession after court-sale.)
- (1910) 8 Ind Cas 4 (5) (Cal).
- (1910) 7 Ind Cas 769 (771) (Cal).
- (1907) 8 South W R 398 (398).
- (1918) 41 Pun L R 186 (187). (Appeal lies from an order transferring decree to another Court for execution, as the order is one relating to the execution though it is itself not an order executing the decree.)
- (1936) AIR 1936 Lah 725 (727). (Though application purports to be under S. 151, the order is under this Section and appeal lies.)
- (1929) AIR 1929 Lah 884 (885). (If the order is under S. 151 it is not appealable.)
- (1914) AIR 1914 Lah 9 (11) : 20 Ind Cas 203 (205) : 1914 Pun Re No. 10. (Do.)
- (1918) 19 Ind Cas 489 (489) (Lah). (Do.)
- (1929) AIR 1929 Pat 391 (392). (Do.)
- (1927) AIR 1927 Lah 651 (652). (Executing Court—No power to amend decree—If it amends, appeal under S. 47 lies.)
- (1907) 2 Mad L Tim 307 (307). (Do.)
- (1915) AIR 1915 Lah 100 (102). (However, if the decree is one under S. 9, Specific Relief Act, no

- appeal lies.)
- (1937) AIR 1937 Mad 509 (511) : I L R (1937) Mad 834. (Even though matter does not fall under this Section, if the order purports to be made under this Section appeal lies.)
- (1936) AIR 1936 Mad 812 (814). (Order refusing application of judgment-debtor to raise attachment is appealable—The fact that order is passed on a separate application by judgment-debtor and not on the execution petition itself does not make any difference.)
- (1936) AIR 1936 Mad 636 (638). (Though purporting to have been passed under S. 151.)
- (1935) AIR 1935 Mad 340 (341). (Order recording satisfaction of decree is appealable—Such order cannot be set aside by executing Court.)
- (1927) AIR 1927 Mad 842 (843).
- (1918) 19 Ind Cas 448 (448) (Mad). (Substance of the order must be looked at if provision of law quoted is not decisive.)
- (1934) AIR 1934 Nag 201 (203) : 13 Nag L R 240. (Question not between parties or representatives—No appeal lies.)
- (1902) 15 C P L R 69 (72).
- (1911) 4 C P L R 132 (133).
- (1936) AIR 1936 Oudh 50 (51) : 11 Luck 519. (Decree discharged as satisfied—Discharge amounts to a decree.)
- (1929) AIR 1929 Pat 472 (472).
- (1929) AIR 1929 Pat 141 (142) : 8 Pat 717.
- (1937) AIR 1937 Pesh 3 (4). (Order by trial Court refusing to allow costs directed to be paid by Privy Council, has force of decree and is appealable.)
- (1928) AIR 1928 Rang 40 (41) : 5 Rang 775. (Refusal to decide objections as to executability—Decree appealable.)
- (1903-1900) 1893-1900 Low Bur Rul 375.
- [But see (1977) 2 Bom 553 (556, 557). (Case under Code of 1859. Order as to amount of mesne profits not a decree—Not good law now.)]
- 2. (199) 26 Cal 539 (541, 542).
- 3. (1906) 11 Cal W N 861 (862).
- (1917) AIR 1917 All 304 (304) : 39 All 357. (Small Cause Court having ceased to exist.)
- 4. (1911) 10 Ind Cas 412 (413) (Cal).
- (1900) 27 Cal 484 (487).
- (1921) AIR 1921 All 55 (55) : 43 All 403.
- (1907) 30 Mad 212 (213).
- (1937) AIR 1937 Pat 349 (351).

and therefore an appeal would lie against an order in execution of an award.<sup>5</sup> Where a decree is obtained in a suit brought under Section 9 of the Specific Relief Act and an order is passed in proceedings in execution of that decree, no appeal lies against that order.<sup>6a</sup> The reason is that Section 9 of that Act provides that "no appeal shall lie from any order or decree passed in any suit under this Section" and applications for execution of decrees are proceedings in suit.

Where a judgment-debtor or a party to the suit objects to the attachment and sale of his properties in execution, or in other words prefers a claim, an order deciding such a claim falls within this Section and is appealable as a decree under Section 96 read with Section 2 clause (2).<sup>6</sup> The words '*as if he was a party to the suit*' in O. 21, R. 58 show that a claim by a party to the suit is not within the scope of that Rule. Even if the matter comes within O. 21 R. 58, still a right of appeal under Section 96 cannot be taken away by any provision, such as O. 21 R. 63, which is not contained in the body of the Code. (Compare the words "provided in the body of this Code" in Section 96 with the words "provided in this Code" in Sections 141, 146 and 148.)

Section 2 clause (2) excludes from the definition of decree any adjudication from which an appeal lies as an appeal from an order. Thus an order appointing a receiver in execution under O. 40 R. 1 is appealable under O. 43 R. 1 (s) and is not a decree appealable under Section 96.<sup>7</sup> As to appeals from orders passed under O. 21, Rr. 89, 90 and 91, see those Rules.

Appeals from orders under this Section are expressly excepted from the provisions of Article 1 of Schedule I of the Court-fees Act by notifications of the various Local Governments under Section 35 of the Court-fees Act and consequently *ad valorem* fee is not payable in respect of such appeals.<sup>8</sup> It has been held that an order

5. ('21) AIR 1921 Sind 132 (133) : 16 Sind L R 245.

('29) AIR 1929 Lah 228 (229).

('34) AIR 1934 Lah 49 (50). (Proceedings for enforcement of award are governed by S. 47—Appeal lies from order rejecting application for enforcement.)

5a. ('18) AIR 1918 Cal 925 (926) : 45 Cal 519.

('32) AIR 1932 Lah 416 (416) : 13 Lah 798.

('08) AIR 1928 Lah 539 (539).

('03) 26 Mad 438 (439).

6. ('16) AIR 1916 Cal 814 (814).

('21) AIR 1921 Cal 242 (244).

('12) 16 Ind Cas 385 (386) (Cal).

('32) AIR 1932 Lah 376 (376). (Even though claim is wrongly described as one under O. 21, R. 58.)

('24) AIR 1924 Lah 589 (590). (Do.)

('27) AIR 1927 Lah 895 (896).

('35) AIR 1935 Mad 923 (924). (Even if Court treats the application as one under O. 21 R. 58 and refers claimant to a suit, appeal is the remedy and not a suit.)

('34) AIR 1934 Mad 435 (435) : 57 Mad 822. (Joint claim by party to suit and by stranger—Appeal by party and suit under O. 21 R. 63 by stranger.)

('21) AIR 1921 Mad 627 (628). (Question under O. 21 R. 97.)

('21) AIR 1921 Mad 612 (614, 615). (Question under O. 21 R. 100, fought out by parties to the suit—Appealable.)

('20) AIR 1920 Mad 126 (128) : 48 Mad 696. (Same principle applies to claims under O. 21, R. 103.)

('16) AIR 1916 Mad 727 (727). (Objection by judgment-debtor to sale.)

('13) 21 Ind Cas 748 (749) (Mad).

('94) 17 Mad 399 (400).

('29) AIR 1929 Oudh 21 (21). (Claim by a party must be decided on the merits and not rejected without enquiry.)

('36) AIR 1936 Pat 268 (270).

('31) AIR 1931 Pat 97 (98).

('31) AIR 1931 Rang 314 (316). (Though it is misdescribed as one under O. 21 R. 58.)

[See ('17) AIR 1917 Bom 133 (134) : 42 Bom 10.]

[But see ('20) AIR 1920 Mad 206 (207). (Obiter).]

7. ('29) AIR 1929 Mad 20 (21).

[But see ('28) 1928 Mad W N 390 (390). (Order appointing receiver in execution—Second Appeal lies.)]

8. ('30) AIR 1930 Lah 24 (25). (S. 35 of the Court-fees Act was amended by Act 38 of 1920 by which Local Governments were empowered to issue notifications.)

('37) AIR 1937 Cal 152 (155) : 1 L R (1937) 1 Cal 637. (By notification of Government of India in force in Bengal the fee chargeable on appeals from orders under S. 47 was limited to amount chargeable under Art. 11 of Sch. II, Court-fees Act.)

('36) AIR 1936 Rang 352 (353).

[See also ('38) AIR 1938 Bom 320 (321).]

under O. 21 R. 50 clauses 2 and 3 is not an order under this Section and that on an appeal from such an order *ad valorem* court-fee is payable.<sup>8a</sup> The Court can require a person appealing from an order under this Section to give security for the costs of the appeal.<sup>9</sup>

See also the undermentioned cases.<sup>10</sup>

**85. Forum of appeal.**—The value of the original suit in which the execution is taken out determines the *forum* of appeal in respect of an order passed in execution proceedings. The actual value of the subject-matter in dispute involved in the order is not the criterion.<sup>1</sup> See Note 18 to Section 96 as to the value of appeal for the purposes of jurisdiction.

**86. Interlocutory orders in execution proceedings.**—The phrase “determination of any question within Section 47” in Section 2 cl. (2) does not make every decision of any question within this Section, a decree. In order to be appealable as a decree, the decision must also have the essential characteristics of a decree as defined in that Section, that is, it must also be the formal expression of an adjudication conclusively determining the *rights* of the parties. If not, the order is merely an *interlocutory* one and is not appealable as a decree.<sup>1</sup> Otherwise “every interlocutory order in an execution proceeding, such as an order granting or refusing process for the examination of witnesses, would be appealable; and far greater latitude would be given

8a. ('39) AIR 1939 Sind 161 (163) (F B). (AIR 1929 Bom 386, Foll.)

9. (1900) 24 Bom 314 (316).

10. ('37) AIR 1937 Pat 380 (381). (Question whether appeal lies against order of Subordinate Court can arise only if order is passed by the Subordinate Court suo motu as a Court of execution and not when order is passed on a direction from the Appellate Court.)

('34) AIR 1934 Pesh 43 (44). (Decree removing Mahant from office—Application for appointing Committee to appoint Mahant—Order thereon—Appeal held not to lie.)

('37) AIR 1937 Pesh 3 (4). (S. 47 applies to execution of decrees of Privy Council — Copy of judgment passed by Court executing decree and presented with memo of appeal should be stamped with a stamp of Re. 1 under Art. 7, Court-Fees Act.)

#### Note 85

1. ('15) AIR 1915 All 349 (349).

('25) AIR 1925 Cal 212 (212).

('19) AIR 1919 Lah 275 (276): 1919 Pun Re No. 44.

#### Note 86

1. ('24) AIR 1924 All 808 (811): 46 All 733.

('33) AIR 1933 Mad 500 (500). (Order overruling preliminary objections by judgment-debtor.)

('11) 11 Ind Cas 545 (545): 38 Cal 717: 6 Low Bur Rul 26: 38 Ind App 126 (P C). (Order refusing leave to bid to a decree-holder under O. 21, R. 72 is only administrative order.)

('35) AIR 1935 All 502 (503). (Order striking off objection for default.)

('32) AIR 1932 All 136 (137).

('31) AIR 1931 All 765 (765). (Order of District Judge approving appointment of a trustee made by committee under a scheme decree — Not a decree.)

31) AIR 1931 All 129 (130, 131). (Order directing

execution against one set of defendants in the first instance—Not a decree.)

('30) AIR 1930 All 638 (639).

('29) AIR 1929 All 390 (391, 392). (Ex parte order under O. 21 R. 50 (2) granting leave to execute — Not a decree.)

('29) AIR 1929 Bom 386 (388): 53 Bom 839. (Do.)

('29) AIR 1929 All 85 (85). (Order refusing stay of sale.)

('24) AIR 1924 Lah 671 (672). (Do.)

('24) AIR 1924 Mad 234 (235). (Do.)

('27) AIR 1927 All 208 (209).

('26) AIR 1926 All 401 (401).

('26) AIR 1926 All 268 (268, 269): 48 All 260.

('25) AIR 1925 All 588 (589): 47 All 543. (Order directing enquiry into mesne profits.)

('24) AIR 1924 All 794 (795). (Order refusing to restore an execution application dismissed for default.)

('28) AIR 1928 Oudh 329 (330). (Do.)

('12) 15 Ind Cas 50 (51): 34 All 530. (Order holding that fresh attachment is not necessary.)

('90) 1890 All W N 85 (86). (Order for recovery of deficiency of price against defaulting purchaser — Not a decree—Not appealable.)

('87) 9 All 500 (503, 504). (Order allowing a payment directed by the decree to be made.)

('19) AIR 1919 Cal 806 (807). (Do.)

('31) AIR 1931 Bom 391 (393, 396): 55 Bom 414. (Scheme decree with liberty to apply for modification—Order on such application—Not appealable.)

('31) AIR 1931 Bom 388 (390). (Order of District Judge as persona designata under a scheme — Not appealable.)

('84) 8 Bom 287 (295).

('31) AIR 1931 Cal 574 (576): 58 Cal 808. (Order under O. 21 R. 99 is not one under S. 47.)

('25) AIR 1925 Cal 679 (680, 681). (Order solely relating to jurisdiction.)

of appealing against orders in such proceedings than is allowed as against orders made in suits before decree—a thing which could hardly have been intended.”<sup>2</sup> But though an order may be interlocutory, if it is one which in *substance* determines a question relating to execution between the decree-holder and the judgment-debtor as, for instance, where it has the effect of reviving an application for execution which was dismissed for default of the decree-holder, especially when a fresh application would be barred by limitation, it will be appealable as a decree.<sup>3</sup> The decision that the executing Court had power to hear the objection application of the judgment-debtor under Section 47 is an order which determines a very important and substantial right and hence is appealable as a decree.<sup>4</sup> As regards the appealability of an order fixing the value of property for the purposes of sale, see O. 21 R. 66. As regards appeals against orders granting or refusing stay of execution, see Note 44, *ante*.

**86a. Parties to proceedings under Section.** — The auction-purchaser is not a necessary party to a proceeding under this Section as between the parties to the suit; nor is his non-joinder in an appeal from an order in such proceedings fatal to it.<sup>1</sup>

**87. Revision.** — An order which is appealable under this Section<sup>1a</sup> or in which there is no question of jurisdiction involved, is not open to revision.<sup>1</sup> In the case of an order not open to appeal, a revision may lie if the conditions of Section 115 are satisfied.<sup>2</sup>

- (‘19) AIR 1919 Pat 383 (383): 4 Pat L Jour 461. (Do.)  
 (‘19) AIR 1919 Cal 471 (472). (Order accepting security under O. 41 R. 5.)  
 (‘81) AIR 1931 Mad 38 (38) : 54 Mad 237. (Do.)  
 (‘12) 13 Ind Cas 170 (170) (Cal).  
 (1900) 7 Cal L Jour 436 (437, 438). (Order refusing grant of sale certificate to decree-holder auction-purchaser.)  
 (‘91) 18 Cal 469 (472). (Order on a preliminary point of law.)  
 (‘20) AIR 1920 Lah 117 (118). (Do.)  
 (‘73) 19 Suth W R 90 (91). (Relating to procedure.)  
 (‘29) AIR 1929 Lah 815 (816). (Do.)  
 (‘30) AIR 1930 Lah 20 (22) : 11 Lah 93. (An order restoring an execution application which had been dismissed for default.)  
 (‘32) AIR 1932 Lah 120 (121). (Order accepting or refusing to accept security, not appealable.)  
 (‘29) AIR 1929 Lah 391 (392). (Administrative order not appealable.)  
 (‘27) AIR 1927 Lah 527 (528). (Order rejecting security and ordering execution to continue.)  
 (‘27) AIR 1927 Lah 337 (337). (Order setting aside sale after confirmation—S. 47 does not apply.)  
 (‘86) 1886 Pun Re No. 55, p. 116.  
 (‘36) AIR 1936 Mad 623 (624). (Order allowing amendment to execution petition is not a decree.)  
 (‘33) AIR 1933 Mad 500 (500).  
 (‘30) AIR 1930 Mad 918 (918, 921) : 54 Mad 315. (Order filling up vacancy in the office of trustee appointed under a scheme—Not covered by S. 47.)  
 (‘29) AIR 1929 Mad 718 (720). (Order under O. 21 R. 22 for arrest and notice at the same time.)  
 (‘36) AIR 1936 Oudh 369 (370). (Order accepting security tendered by judgment-debtor and directing stay of execution.)  
 (‘38) AIR 1938 Pat 216 (220).  
 (‘37) AIR 1937 Rang 157 (159). (Final decree for sale in mortgage suit — Order by District Court

in execution directing sale of properties outside district — Order is not appealable as it does not affect the question as to the liability of the properties to be sold.)

(‘27) AIR 1927 Rang 317 (317) : 5 Rang 534 : 5 Rang 641. (Order requiring security before drawing out money.)

(‘25) AIR 1925 Rang 271 (273) : 3 Rang 132.

[See (‘02) 29 Cal 622 (625). (Order determining principle for ascertainment of mesne profits held not interlocutory.)]

[But see (‘32) AIR 1932 All 85 (89) : 53 All 391. (Order prescribing the order of sale of mortgaged properties falls under S. 47—Appealable.)

(‘16) AIR 1916 Cal 471 (472). (Question as to benami transfer of decree governed by the Section.)]

2. (‘97) 24 Cal 725 (739) (F B). (Per Banerji, J.)  
 (‘14) AIR 1914 Cal 149 (149) : 20 Ind Cas 72 (72) : 41 Cal 160.

(‘11) 12 Ind Cas 745 (749, 750) (Cal).

(‘11) 10 Ind Cas 371 (371, 372) (Cal).

(‘09) 2 Ind Cas 338 (341) : 36 Cal 422. (The propriety of such interlocutory orders can be attacked in the appeal from the final order.)

3. (‘20) AIR 1920 Cal 534 (535).

4. (‘39) AIR 1939 Lah 177 (178).

#### Note 86a

1. (‘39) AIR 1939 Nag 183 (186).

#### Note 87

1a. (‘29) AIR 1929 Pat 141 (142) : 8 Pat 717.

1. (1900) 2 Bom L R 887 (888).

(‘33) AIR 1933 Bom 185 (186).

(‘36) AIR 1936 All 479 (480).

(‘31) AIR 1931 All 765 (766).

(‘05) 32 Cal 572 (575). (Only an error of law.)

(‘32) AIR 1932 Lah 96 (97). (Order under S. 73—No revision—Practice of Lahore High Court.)

2. (‘28) AIR 1928 Lah 811 (812).

of appealing against orders in such proceedings than is allowed as against orders made in suits before decree—a thing which could hardly have been intended.”<sup>2</sup> But though an order may be interlocutory, if it is one which in *substance* determines a question relating to execution between the decree-holder and the judgment-debtor as, for instance, where it has the effect of reviving an application for execution which was dismissed for default of the decree-holder, especially when a fresh application would be barred by limitation, it will be appealable as a decree.<sup>3</sup> The decision that the executing Court had power to hear the objection application of the judgment-debtor under Section 47 is an order which determines a very important and substantial right and hence is appealable as a decree.<sup>4</sup> As regards the appealability of an order fixing the value of property for the purposes of sale, see O. 21 R. 66. As regards appeals against orders granting or refusing stay of execution, see Note 44, *ante*.

**86a. Parties to proceedings under Section.** — The auction-purchaser is not a necessary party to a proceeding under this Section as between the parties to the suit; nor is his non-joinder in an appeal from an order in such proceedings fatal to it.<sup>1</sup>

**87. Revision.** — An order which is appealable under this Section<sup>1a</sup> or in which there is no question of jurisdiction involved, is not open to revision.<sup>1</sup> In the case of an order not open to appeal, a revision may lie if the conditions of Section 115 are satisfied.<sup>2</sup>

(‘19) AIR 1919 Pat 383 (383): 4 Pat L Jour 461. (Do.)  
(‘19) AIR 1919 Cal 471 (472). (Order accepting security under O. 41 R. 5.)

(‘31) AIR 1931 Mad 38 (38) : 54 Mad 237. (Do.)  
(‘12) 13 Ind Cas 170 (170) (Cal).

(1900) 7 Cal L Jour 436 (437, 438). (Order refusing grant of sale certificate to decree-holder auction-purchaser.)

(‘91) 18 Cal 469 (472). (Order on a preliminary point of law.)

(‘20) AIR 1920 Lah 117 (118). (Do.)

(‘73) 19 Suth W R 90 (91). (Relating to procedure.)

(‘29) AIR 1929 Lah 815 (816). (Do.)

(‘30) AIR 1930 Lah 20 (22) : 11 Lah 93. (An order restoring an execution application which had been dismissed for default.)

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(‘27) AIR 1927 Lah 337 (337). (Order setting aside sale after confirmation—S. 47 does not apply.)

(‘86) 1886 Pun Re No. 55, p. 116.

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(‘36) AIR 1936 Oudh 369 (370). (Order accepting security tendered by judgment-debtor and directing stay of execution.)

(‘38) AIR 1938 Pat 216 (220).

(‘37) AIR 1937 Rang 157 (159). (Final decree for sale in mortgage suit — Order by District Court

in execution directing sale of properties outside district — Order is not appealable as it does not affect the question as to the liability of the properties to be sold.)

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(‘25) AIR 1925 Rang 271 (273) : 3 Rang 132.

[See (‘02) 29 Cal 622 (625). (Order determining principle for ascertainment of mesne profits held not interlocutory.)]

[But see (‘32) AIR 1932 All 85 (89) : 53 All 391. (Order prescribing the order of sale of mortgaged properties falls under S. 47—Appealable.)]

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(‘11) 12 Ind Cas 745 (749, 750) (Cal).

(‘11) 10 Ind Cas 371 (371, 372) (Cal).

(‘09) 2 Ind Cas 338 (341) : 36 Cal 422. (The propriety of such interlocutory orders can be attacked in the appeal from the final order.)

3. (‘20) AIR 1920 Cal 534 (535).

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1. (1900) 2 Bom L R 887 (888).

(‘33) AIR 1933 Bom 185 (186).

(‘36) AIR 1936 All 479 (480).

(‘31) AIR 1931 All 765 (766).

(‘05) 32 Cal 572 (575). (Only an error of law.)

(‘32) AIR 1932 Lah 96 (97). (Order under S. 73—No revision—Practice of Lahore High Court.)

2. (‘28) AIR 1928 Lah 811 (812).

## LIMIT OF TIME FOR EXECUTION

**48.** [S. 230, paras. 3 and 4.] (1) Where an application to execute a decree<sup>4</sup> not being a decree granting an injunction<sup>2</sup> has been made,<sup>5</sup> no order for the execution of the same decree shall be made upon

Execution barred in certain cases.

any fresh application presented after the expiration of twelve years<sup>6</sup> from —

(a) the date of the decree sought to be executed,<sup>10</sup> or,

(b) where the decree or any subsequent order<sup>11</sup> directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods,<sup>12</sup> the date of the default in making the payment or delivery in respect of which the applicant seeks to execute the decree.

(2) Nothing in this section shall be deemed —

(a) to preclude the Court from ordering the execution of a decree upon an application presented after the expiration of the said term of twelve years, where the judgment-debtor has, by fraud or force,<sup>15</sup> prevented the execution of the decree at some time within twelve years immediately before the date of the application : or

(b) to limit or otherwise affect the operation of article 180 of the second Schedule to the Indian Limitation Act, 1877.<sup>2</sup>

[1877, S. 230 paras. 3 and 4 and S. 231; 1859, S. 207.]

*Synopsis*

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| <ol style="list-style-type: none"> <li>1. Legislative changes.</li> <li>2. Object, applicability and scope of the Section.</li> <li>3. Retrospective operation of the Section.</li> <li>4. "Application to execute a decree."</li> <li>5. "Has been made."</li> <li>6. Fresh application presented after the expiration of twelve years.</li> <li>7. "Fresh application" as contra-distinguished from "continuation of previous application."</li> <li>8. Successive applications for execution of decrees of Courts other than Chartered High Courts.</li> </ol> | <ol style="list-style-type: none"> <li>9. Applicability of the Section to Chartered High Courts — Sub-section 2 (b).</li> <li>10. "Date of the decree sought to be executed."</li> <li>11. Subsequent order, meaning of.</li> <li>12. "At a certain date or at recurring periods."</li> <li>13. Exclusion of time during minority or other disability of decree-holder. See Note 21 to Section 6 of the Authors' Commentaries on the Limitation Act.</li> <li>14. Deduction of time for other causes.</li> <li>15. "By fraud or force."</li> <li>16. Appeal from orders under the Section.</li> <li>17. Plea of bar under the Section, when to be raised.</li> </ol> |
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Other Topics

Combined mortgage decree—See Note 10 Pts. (5) and (6).  
Continuation of application—Step-in-aid of execution. See Notes 7 and 8.  
Decree directing mesne profits to be ascertained in execution. See Note 10 F. N. 3.  
Decree not being a decree for injunction. See Note 1 Pt. (6).  
Dekkhan Agriculturists' Relief Act, 17 of 1879. See Note 14.  
Direction for recovery from one party on failure of another. See Note 12 Pt. (8).

Execution. See Note 10 F. N. 3.  
Execution by Collector. See Note 14.  
Limitation Act, Sections 4 and 15. See Note 14 Pts. (1) and (2).  
Maintenance decree. See Note 12 Pt. (4).  
Terminus a quo for limitation. See Note 10.  
To limit or otherwise affect Art. 180 of Limitation Act. See Note 2.  
Where decree is transferred for execution. See Section 39.

**1. Legislative changes.** — This Section corresponds to paragraphs 3 and 4 of Section 230 of the Code of 1882 with the following alterations:—

- (i) The old Section applied only to decrees for payment of money or delivery of other property. The present Section is made applicable to all decrees of any kind whatsoever, except decrees granting injunction. See Note 2 below.
- (ii) The words "under the Section and granted" occurring after the word "made" in the old Section have been omitted, with the result that the present Section applies under whatever Code the previous application may have been made and whether such application was granted or not. See Note 2 below.
- (iii) For the words "no subsequent application to execute the same decree shall be granted after" have been substituted the words "no order for execution of the same decree shall be made upon any fresh application presented after." See Notes 6 and 7 below.
- (iv) The words "or of the decree in appeal (if any) affirming the same" have been omitted as superfluous and tending to confusion. See Note 10 below.
- (v) The words "or at recurring periods" have been newly added in sub-section (1) clause (b). See Note 12 below.
- (vi) Sub-section (2) clause (b) was newly added. See Note 9 below.

Article 180 of the second Schedule of the Indian Limitation Act, 1877, corresponds to Article 183 of the Indian Limitation Act, IX of 1908, Schedule I.

**2. Object, applicability and scope of the Section.** — A decree-holder is entitled, as of right, to execute his decree and for that purpose may make any number of applications in succession.<sup>1</sup> He cannot be refused execution unless his application is barred by the principles of *res judicata* or by Article 182 of the Limitation Act, 1908. This Section imposes a further restriction on the rights of the decree-holder by fixing a *maximum limit of time* for execution and by enacting that no order for execution shall be made upon an application presented after the expiry of twelve years from certain specified dates.<sup>2</sup> The effect of the Section is not to supersede the law of

Section 48 — Note 2

1. ('95) 17 All 106 (111, 112); 22 Ind App 44 (PC).
2. ('24) AIR 1924 All 263 (265) : 46 All 73.
- ('22) AIR 1922 Mad 268 (268) : 45 Mad 785.
- ('26) AIR 1926 All 93 (94) : 48 All 121.
- ('24) AIR 1924 Mad 163 (167) : 47 Mad 120.

Under the Code of 1877, S. 230, there was a provision for an application to be made after the 12 years, if the same was made within 3 years

of the passing of that Code. But only one such application could be made within those three years :

- ('81) 1881 All W N 58 (58). (Meaning of "after the passing of the Code" in S. 230 of 1877 Code.)
- ('82) 1882 All W N 2 (2). (Do.)
- ('83) 7 Bom 214 (216). (Do.)
- ('85) 1885 All W N 193 (193).
- ('80) 5 Bom 245 (246).

limitation but only to fix the *outside period* after which, *execution* of a decree, though not barred by the Limitation Act, may not be granted.<sup>3</sup> The object of this Section is to prevent execution proceedings being kept pending indefinitely to the harassment of judgment-debtors and to require sufficient diligence on the part of the decree-holders.<sup>3a</sup>

Section 230 of the old Code referred only to decree for the *payment of money or delivery of other property*, and it was consequently held that it did not apply to *mortgage* decrees.<sup>4</sup> There was also a conflict of opinion as to the application of the Section to cases where a decree was passed personally against *A* for payment of money, and in default, for sale of *B's* (surety's) property.<sup>5</sup> The omission of the words, "for the payment of money or delivery of other property" in the present Section makes it clear that it applies to *all* decrees of any kind except a decree granting injunction.<sup>6</sup>

Before the execution of a decree can be held to be barred under the Section, it must be shown that the decree was, in all parts, ripe for execution on the date from which the twelve years' period is to be computed.<sup>6a</sup> Where a decree-holder applies for execution and a fresh application therefor in the future is likely to be barred under the provisions of this Section, the Court should allow the decree-holder to exhaust all lawful means of realising his decree in the pending application, before finally dismissing it.<sup>7</sup> But the salutary rule enacted in this Section should not be permitted to be evaded as, for example, by striking off an execution petition and continuing the attachment so as to enable the decree-holder to apply for execution after the twelve years' period under the pretext of continuing a pending application.<sup>8</sup>

The Section only requires that the *application* should be presented within twelve years. The *order* on such application may be made even after the expiry of the specified period.<sup>9</sup>

('87) 11 Bom 524 (526).

('86) 12 Cal 559 (561).

('77) 2 Mad 218 (218).

('81) 7 Cal 556 (559).

[See ('84) 6 All 189 (192).]

[See also ('82) 1882 All W N 111 (111).]

3. ('32) AIR 1932 Oudh 220 (221).

('89) 1889 Pun Re No. 109, page 380.

('93) 1893 All W N 124 (125).

('88) 1888 Pun Re No. 27, page 73.

('32) AIR 1932 Oudh 69 (71) : 8 Oudh W N 1186 (1191). (Section in effect lays down limitation for execution of decree under S. 78 (2), Provincial Insolvency Act.)

('91) 1891 Pun Re No. 9, page 81.

('15) AIR 1915 Bom 40 (41) : 39 Bom 256. (Execution may be barred under this Section, though the application may not be barred by *res judicata* or Art. 182, Limitation Act.)

[See ('05) 1905 Upp Bur Rul C P C 26.]

3a. ('28) AIR 1928 Mad 1154 (1156).

4. (13) 18 Ind Cas 455 (457) (Cal).

('98) 25 Cal 580 (583, 584).

('05) 28 Mad 224 (226).

(1900) 22 All 401 (403). (Even though the judgment-debtor was personally liable for the deficiency.)

('05) 28 Mad 473 (478). (FB). (Do.)

('03) 25 All 541 (543, 544).

('94) 16 All 418 (419, 420).

('93) 1893 All W N 184 (184).

('98) 1898 All W N 114 (115). (Decree against legal

representative out of assets—Decree for money.)

('08) 1908 Pun L R No. 121, page 369 (369).

(Decree for money by sale of specific property — Decree for money under this Section.)

[But see ('04) 31 Cal 792 (796). (Where a combined decree (mortgage as well as a personal decree for balance) under Ss. 88 and 90, Act IV of 1882, is passed though wrongly and the decree-holder proceeds to execute it for the balance after the property has been sold, this Section will apply—25 All 541 Dissented from.)]

5. ('12) 16 Ind Cas 190 (191) : 34 All 636. (Applies.)

('12) 13 Ind Cas 187 (187, 188) (All). (No.)

6. ('15) AIR 1915 Mad 407 (410). (Decree directing execution of conveyance.)

('15) AIR 1915 Bom 40 (41) : 39 Bom 256. (Compromise decree.)

6a. ('20) AIR 1920 Nag 40 (41).

[See also ('08) 5 All L Jour 403 (404). (Such as decree ordering sale of share in a non-existing village.)]

7. ('26) AIR 1926 Lah 544 (544).

8. ('10) 8 Ind Cas 727 (728) (Oudh).

[See also ('28) AIR 1928 Mad 1154 (1155).]

9. ('37) AIR 1937 Mad 113 (113).

('83) 6 Mad 359 (361).

('34) AIR 1934 Lah 610 (611, 612).

('10) 5 Ind Cas 474 (475) (Mad). (Also an application presented in time but corrected at the Court's direction and re-presented after time is not defective in any way and is not barred.)

This Section does not apply to decrees of Presidency Small Cause Courts and such decrees, though transferred for execution to the City Civil Court, are nonetheless not governed by the Section.<sup>10</sup>

The Section bars only the *execution of the decree* after the specified period. The rights of the decree-holder in other respects are not in any way affected by its provisions.<sup>11</sup>

**3. Retrospective operation of the Section.** — It has already been observed in Note 3 to the Preamble that no one has a vested right in *procedure*. The right to execute a decree is only a right of *procedure* and not a *vested* right<sup>1</sup> and the law governing an application to execute a decree will be the law of procedure in force at the time of the *application* and not the law in force when the decree was passed.<sup>2</sup> Thus, where a mortgage decree is passed under the old Code but an application is presented for execution of that decree more than twelve years after the date of the decree and after the present Code came into force, the application will be barred though Section 230 of the old Code did not apply to mortgage decrees.<sup>3</sup>

**4. "Application to execute a decree."** — An application to execute a decree means an application under O. 21 R. 11 or otherwise by "which proceedings in execution are *commenced* and not merely an *incidental* application."<sup>1</sup> It should be an application in accordance with law, asking for a relief granted by the decree and for obtaining it in the mode admitted by law.<sup>2</sup> An application to the Court passing a decree to *transfer* it for execution to another Court is not such an application.<sup>3</sup> But where a decree gives reliefs of different characters, there is nothing in the Code preventing separate and successive applications for execution as regards each of such reliefs.<sup>4</sup>

**5. "Has been made."** — As to the distinction between the present Section and old Section 230 in this respect, see Note 2 above. The words "under this Section and granted" which occurred after the word "made" in the old Section gave rise to

('26) AIR 1926 All 331 (331, 332):

[See ('30) AIR 1930 Mad 995 (998): 54 Mad 306.]

10. ('11) 11 Ind Cas 635 (637) : 36 Mad 108.

11. ('10) 5 Ind Cas 92 (93): 33 Mad 429. (Mortgage of a mortgage decree after 12 years — Mortgagee can sue decree-holder for recovery of moneys realised by him.)

('24) AIR 1924 Mad 163 (165, 167) : 47 Mad 120. (It does not mean that a decree more than 12 years old is not provable in insolvency proceedings.)

### Note 3

1. ('13) 21 Ind Cas 113 (114, 115) (Cal). (The right to execute a decree is not a substantive right.)

('17) AIR 1917 Pat 485 (486). (No vested right in the procedure prescribed in that Code was acquired by the decree-holder.)

[But see ('10) 32 All 499 (502). (The right to enforce execution of decree is a substantive right.)]

2. ('26) AIR 1926 All 93 (94) : 48 All 121.

('81) 3 Mad 98 (101).

Section 230 of the Code of 1882 was held in the following cases not to revive decrees dead under the Code of 1877 :

('84) 6 All 388 (390).

('86) 8 All 419 (427).

3. ('21) AIR 1921 Bom 40 (43) : 45 Bom 365.

('13) 21 Ind Cas 923 (924) (Cal).

('17) AIR 1917 Pat 493 (494).

('13) 19 Ind Cas 391 (392) : 40 Cal 704.

('15) AIR 1915 Nag 103 (106) : 11 Nag L R 25.

('17) AIR 1917 Mad 315 (316).

('24) AIR 1924 All 696 (696).

('25) AIR 1925 Bom 326 (326).

('13) 19 Ind Cas 899 (900) (Cal).

[See however ('19) AIR 1919 Cal 1003 (1004). (The mere fact of coming into force of the new Code pending a suit on a mortgage under the Transfer of Property Act does not make the new S. 48 applicable to proceedings in execution of the decree in that suit.)]

### Note 4

1. ('77) 3 Cal 235 (242) (FB).

('78) 2 Mad 1 (4).

('98) 1898 Pun Re No. 40, page 138.

2. ('89) 13 Bom 237 (239).

3. ('29) AIR 1929 Mad 745 (745).

('12) 14 Ind Cas 277 (277) (All).

('26) AIR 1926 All 660 (660).

('86) 1886 All W N 137 (137).

('98) 20 All 78 (79).

('10) 8 Ind Cas 168 (171) : 35 Bom 103.

('12) 14 Ind Cas 172 (173) : 34 All 396.

('89) 16 Cal 744 (746).

4. ('91) 18 Cal 515 (518).

As a general rule where the previous application has been suspended or stayed or dismissed for no fault of the decree-holder and the second application is similar in scope and character to the previous one, the second application will be deemed to be an *ancillary one in continuation* of the previous one.<sup>5</sup> Where the *character* of the second application is different from that of the former, as for instance, where the relief claimed in the second application is against properties or persons different from those in the previous application, the second application will be deemed to be a "fresh application"

5. ('37) AIR 1937 Nag 92 (93) : I L R (1937) Nag 522.
- ('37) AIR 1937 Pat 43 (44). (Execution sale set aside—Next application for sale.)
- ('36) AIR 1936 Lah 843 (844). (Temporary release of attached property in pursuance of judgment-debtor's objections—Objections overruled in appeal—Re-attachment of the same property—Continuation of previous proceedings.)
- ('35) AIR 1935 Lah 911 (912). (Proceedings interrupted by claim suit.)
- ('24) AIR 1924 Pat 367 (369, 370).
- ('34) AIR 1934 Pat 532 (533). (Previous application for execution not proceeded with because of claim made and allowed—Subsequent application after the removal of the bar is one in continuation of the first.)
- ('34) AIR 1934 All 481 (487, 489, 493) : 56 All 791 (F B). (Execution petition for the sale of some of the mortgaged properties by transfer to Collector with a statement that in case of deficiency the other mortgaged properties may be sold—First prayer granted but no orders on second—Subsequent application for second relief is only a continuation of the first application.)
- ('31) AIR 1931 Bom 492 (494).
- ('22) AIR 1922 Mad 3 (5). (The theory of continuation applies only where the previous application has been interrupted by reason of circumstances over which the decree-holder has no control.)
- ('12) 14 Ind Cas 172 (173) : 34 All 396. (To render an application one in continuation of another application, it is necessary that the two applications should be of the same nature.)
- ('14) AIR 1914 Oudh 430 (432) : 17 Oudh Cas 169.
- ('18) AIR 1918 Pat 296 (297) : 3 Pat L Jour 103.
- ('11) 11 Ind Cas 48 (49) (Cal).
- ('13) 18 Ind Cas 841 (843) (Cal).
- ('09) 3 Ind Cas 940 (940) (Mad). (That the order "proceedings closed" did not amount to dismissal.)
- ('30) AIR 1930 Lah 647 (651). (On an application records consigned to the record room pending appeal—Nature of order is a question of intention.)
- ('84) 10 Cal 416 (423). (Striking off.)
- ('92) 16 Bom 294 (302, 303). (Application struck off not necessarily cancelled.)
- ('16) AIR 1916 All 24 (24). (Injunction.)
- ('26) AIR 1926 All 331 (332). (Applications by decree-holder to the Court executing the decree to go on from where the previous proceedings have been arrested and to complete the execution are to be considered as merely ancillary and therefore not barred by the Section.)
- ('98) 1898 All W N 137 (138) (Do.)
- ('12) 16 Ind Cas 541 (542) (Cal). (Judgment-debtor declared insolvent.)
- ('13) 20 Ind Cas 244 (245) (Cal). (Injunction.)
- ('09) 1 Ind Cas 341 (343) (Cal). (Execution saleset aside—Further application for execution is in continuation of previous one.)
- ('85) 1885 All W N 269 (269). (Postponement of execution to enable debtor to raise money—Subsequent application for execution held to be linked to the prior one.)
- ('88) 1888 All W N 295 (296). (First application made in May, 1883, struck off without either granting or refusing it.)
- ('05) 2 All L Jour 276 (277). (Former application never finally disposed of.)
- ('13) 21 Ind Cas 923 (924) (Cal).
- ('15) AIR 1915 Mad 407 (411). (Disposal of previous application not known.)
- ('08) 31 Mad 71 (74). (Conditions under which prior execution petition will be treated as pending.)
- ('10) 7 Ind Cas 707 (708) (All). (Obstruction by judgment-debtor—Application after removal of obstruction.)
- ('11) 10 Ind Cas 359 (360) (Cal).
- ('10) 6 Ind Cas 490 (490) (Lah). (First application struck off on judgment-debtor not being found—Second application for arrest held to be a continuation of the prior one.)
- ('99) 21 All 155 (158). (Do.)
- ('31) AIR 1931 Lah 125 (126). (Dismissal for decree-holder's default—Not a continuation.)
- See also the following cases to a similar effect under the old Code :*
- ('08) 30 All 499 (503, 504).
- ('09) 1909 Pun Re No. 45, page 148.
- ('83) 5 All 459 (461).
- ('98) 21 Mad 261 (263).
- ('83) 5 All 243 (244, 245).
- ('81) 5 Bom 29 (35).
- ('86) 8 All 545 (548).
- ('01) 23 All 13 (20).
- ('87) 14 Cal 385 (387).
- ('79) 4 Cal 415 (416, 417).
- ('06) 28 All 651 (654).
- ('86) 12 Cal 161 (164, 165).
- ('77) 1 All 355 (360) (F B).
- ('82) 9 Cal L Rep 297 (300).
- ('84) 6 All 23 (24).
- ('94) 21 Cal 387 (391).
- ('95) 17 All 425 (427).
- ('95) 17 All 243 (244).
- ('05) 27 All 334 (338) : 32 Ind App 102 (P O).
- ('01) 1901 All W N 117 (117).

within the meaning of this Section.<sup>6</sup> Similarly, where the proceedings under the prior application have *come to an end*, the second application cannot be taken to be one in continuation of the prior application.<sup>6a</sup>

Where an application made within twelve years of the specified date is found to be defective, an amendment thereof after twelve years is not necessarily *ultra vires* of the powers of the Court. But a decree-holder who is not diligent should not in the absence of special and sufficient grounds be allowed to circumvent the provisions of this Section by way of amendment. Where the decree-holder applied on the last day of limitation for the arrest and attachment of *moveable* property of the judgment-debtor and thereafter sought to amend it by adding a prayer for the attachment of *immovable* property, it was held that the result of allowing the amendment would be to circumvent the provisions of this Section and that it should not therefore be allowed.<sup>6b</sup> Where an amendment is allowed, the question whether it will operate so as to make the application a proper one for the purposes of the Section on the date on which it was made, depends upon the circumstances of each case.<sup>7</sup> If the defect is not a fundamental one, it will have such operation.<sup>8</sup> If it is a fundamental one, the amendment will not operate to save limitation under this Section.<sup>9</sup>

A Court executing a decree, while rejecting an application for execution, is not competent to order that a fresh application may be filed within a certain time when such an application would be barred by the Section.<sup>10</sup>

**8. Successive applications for execution of decrees of Courts other than Chartered High Courts.** — See Note 2 above. As has been observed in that Note, this Section only fixes the *maximum* limit of time for execution of a decree and subject to such outside limit, a final order on a previous execution application or an application to take some step-in-aid of execution will afford a fresh starting point of limitation.<sup>1</sup>

6. ('36) AIR 1936 Pesh 209 (210).
- ('29) AIR 1929 P C 209 (212) (P C).
- ('96) 18 All 9 (11). (First application for attachment—Second for arrest.)
- ('12) 13 Ind Cas 929 (929) (All). (First application for arrest—Second for attachment.)
- ('31) AIR 1931 All 31 (32). (Do.)
- ('02) 1902 Pun L R No. 112.
- ('10) 5 Ind Cas 815 (816) : 1910 Pun Re No. 17. (First application against moveables — Second against immovables.)
- ('28) AIR 1928 Cal 241 (243). (First application for rateable distribution—Second application for attachment and sale.)
- ('81) 7 Cal 556 (558, 559). (Substitution of new properties.)
- ('31) AIR 1931 All 134 (134) : 53 All 419. (Do.)
- ('24) AIR 1924 Cal 131 (132) : 50 Cal 743. (Adding of new properties.)
- ('26) AIR 1926 All 93 (95) : 48 All 121.
- ('18) AIR 1918 Mad 449 (449). (Prior application for sale of hypothecated property—Second application for sale of other properties.)
- 6a. ('12) 13 Ind Cas 160 (160) (Mad).  
[See also ('93) 1893 All W N 124 (125).  
(13) 20 Ind Cas 563 (564) (Lah).]
- 6b. ('36) AIR 1936 Mad 623 (624).
7. ('28) AIR 1928 Mad 1154 (1155, 1156).
8. ('35) AIR 1935 Mad 161 (163). (Execution application filed bona fide against wrong legal

representative within time—Amendment allowed but after 12 years' time—Amendment takes effect from date of original representation.)

- ('15) AIR 1915 Mad 1042 (1043).
- ('05) 1905 Pun Re No. 27. (Amendment as to particulars.)  
[See also ('30) AIR 1930 Oudh 65 (66) : 5 Luck 458. (Application returned for not filing process fee with the application—Amendment is retrospective.)]
9. ('15) AIR 1915 Mad 1042 (1043).
- ('90) 17 Cal 631 (636, 637, 638 and 641) (FB).
- ('28) AIR 1928 Lah 808 (811). (Application to file a supplementary list of properties.)
- ('27) AIR 1927 Mad 347 (347). (Amendment by adding other items of property.)
- ('05) 15 Mad L Jour 243 (244). (An application for arrest of judgment-debtor if subsequently amended by a prayer for execution against his properties is a fresh application.)
- ('02) 1902 Pun L R No. 112. (Do.)
- ('03) 26 Mad 101 (103). (Petition when filed unverified.)
- ('29) AIR 1929 Pat 407 (409) : 8 Pat 462. (Amendment by substituting immovables properties in place of moveables cannot be made.)
10. ('09) 4 Ind Cas 958 (959) (Lah).

#### Note 8

1. See Article 182 (5) of the Limitation Act, as amended by Act IX of 1927.

As to what are "steps-in-aid of execution," see the Limitation Act, Article 182 and also the undermentioned cases.<sup>2</sup>

**9. Applicability of the Section to Chartered High Courts—Sub-section 2 (b)** — Sub-section 2 (b) is new. It was held under the old Code that, in view of the provision in Article 180 of the Limitation Act, 1877, for a revivor of the decrees of Chartered High Courts in the exercise of *ordinary original civil jurisdiction* and of orders of His Majesty in Council, Section 230 did not apply to Chartered High Courts in the exercise of *ordinary original civil jurisdiction*.<sup>1</sup> Sub-section 2 (b) has been added to give legislative recognition to that view. In the case of such decrees and orders, therefore, any number of applications for execution can be made and cannot be refused<sup>2</sup> unless they are barred on the principle of *res judicata*<sup>3</sup> or under Article 183 of the Limitation Act, 1908. Article 183 of the Limitation Act, 1908, does not however apply to decrees of Chartered High Courts in the exercise of *appellate jurisdiction*.<sup>4</sup>

2. ('84) 7 Mad 306 (307).  
 ('91) 15 Bom 405 (407).  
 ('98) 22 Bom 722 (726).  
 ('95) 22 Cal 375 (377).  
 ('98) 2 Cal W N cclxxi (Note).  
 ('13) 18 Ind Cas 97 (98) : 16 Oudh Cas 70.  
 ('13) 19 Ind Cas 664 (665) : 35 All 389.  
 ('98) 20 Cal 755 (757).  
 ('94) 1894 Pun Re No. 27.  
 ('97) 24 Cal 778 (780, 784).  
 ('11) 9 Ind Cas 800 (801) (All).  
 ('13) 21 Ind Cas 782 (783) (Mad).  
 ('91) 15 Bom 242 (244).  
 ('91) 15 Bom 245 (247).  
 ('99) 26 Cal 888 (890).  
 ('83) 6 Mad 250 (251).  
 ('94) 17 Mad 76 (77).  
 ('15) AIR 1915 Mad 1042 (1043).  
 ('08) 31 Mad 234 (235).  
 ('08) 31 Mad 68 (69).  
 ('93) 16 Mad 452 (453).  
 ('99) 23 Bom 644 (651).  
 ('91) 13 All 89 (92).  
 ('88) 15 Cal 363 (365).  
 ('96) 23 Cal 690 (692).  
 ('91) 13 All 211 (213).  
 ('12) 14 Ind Cas 468 (469) : 1912 Pun Re No. 60.  
 ('15) AIR 1915 Mad 314 (315).  
 ('94) 21 Cal 23 (26).  
 ('97) 19 All 477 (479).  
 (1900) 27 Cal 709 (713).  
 ('01) 24 Mad 185 (188).  
 ('09) 1 Ind Cas 430 (431) (Cal).  
 ('82) 8 Cal 89 (91).  
 ('84) 10 Cal 549 (550, 551).  
 ('94) 17 Mad 165 (166).  
 ('96) 23 Cal 196 (199).  
 ('98) 22 Bom 340 (343).  
 ('12) 14 Ind Cas 335 (339) (Lah).  
 ('01) 24 Mad 188 (194).  
 ('80) 3 All 320 (321).  
 ('82) 4 All 60 (62).  
 ('86) 12 Cal 603 (609).  
 ('87) 9 All 9 (10).  
 ('90) 12 All 399 (403, 404).  
 ('93) 20 Cal 696 (698).  
 ('14) AIR 1914 Bom 288 (289) : 38 Bom 47.

- ('10) 5 Ind Cas 758 (758) (Mad).  
 ('29) AIR 1929 Bom 279 (283).  
 ('10) 8 Ind Cas 833 (834) (Cal).  
 ('12) 17 Ind Cas 30 (30) : 36 Bom 638.  
 ('10) 5 Ind Cas 147 (148) (Cal).  
 ('83) 5 All 344 (345).  
 ('98) 25 Cal 594 (601) (FB).  
 ('94) 21 Cal 23 (26).  
 ('94) 16 All 75 (77).  
 ('96) 23 Cal 817 (821).  
 (1900) 27 Cal 285 (288).  
 ('82) 5 Mad 141 (142).  
 ('96) 19 Mad 67 (70).  
 ('97) 19 All 71 (72).  
 (1900) 27 Cal 210 (212, 215).  
 ('09) 2 Ind Cas 88 (88) (All).  
 ('09) 31 All 309 (312).  
 ('99) 23 Bom 478 (483).  
 ('85) 7 All 898 (899).  
 ('89) 16 Cal 747 (748).  
 ('91) 13 All 124 (126).  
 ('04) 31 Cal 1011 (1013).  
 ('88) 11 Mad 336 (339).  
 ('95) 22 Cal 827 (829).  
 ('99) 23 Bom 311 (312).  
 ('85) 11 Cal 227 (229).  
 ('98) 21 Mad 400 (401).  
 ('83) 9 Cal 730 (731).  
 (1900) 22 All 358 (359).  
 ('03) 30 All 179 (180).  
 ('97) 19 All 337 (339).  
 ('99) 22 Mad 448 (452).  
 ('98) 20 All 304 (306, 307).  
 ('04) 26 All 608 (610).  
 ('96) 22 Bom 83 (85).  
 ('10) 6 Ind Cas 490 (490) (Lah).  
 ('88) 1888 Pun Re No. 27, p. 73.  
 ('08) 1908 Pun Re No. 103, p. 480 (FB).

#### Note 9

1. ('09) 1 Ind Cas 168 (174) : 36 Cal 543.  
 ('82) 6 Bom 258 (260).  
 ('84) 7 Mad 540 (545).  
 ('93) 20 Cal 551 (557).
2. See Art. 183 of the Limitation Act, 1908.
3. See S. 11, Note 23.
4. ('72) 14 Moo Ind App 465 (484) (PC). (Case under Act XIV of 1859.)

**10. "Date of the decree sought to be executed."** — In the absence of the circumstances specified in sub-section 1 (b) and in the absence of anything postponing the period of execution, the period of twelve years is to be computed from the date of the decree.<sup>1</sup> The date of the decree is the date which it ought to bear under O. 20 R. 7 and not the date when it is actually *prepared* and signed by the Judge.<sup>2</sup>

Where there is a preliminary and a final decree in a suit, the two must, for the purposes of this Section, be taken to be a single and indivisible decree and the date from which the time is computed is the date of the *final* decree.<sup>3</sup> Where a decree is amended, the date of the amendment will not give a fresh starting point of limitation under this Section.<sup>4</sup> In the case of a combined mortgage decree which provides that if the nett proceeds of the sale are not sufficient to satisfy the mortgagee's claim the balance be realised from the person and other properties of the mortgagor, the period will run from the date of the decree in respect of *both* remedies.<sup>5</sup> If, however, after the sale of the mortgaged properties a personal decree for the balance is passed under O. 34 R. 6, time will run in respect of the personal decree from the date thereof.<sup>6</sup> Where a redemption decree does not mention any date for the payment of the mortgage debt, it must be taken as payable on the date of the decree itself.<sup>7</sup>

The words "or of the decree in appeal confirming the same" have been omitted in this Section as being a mere surplusage. Where there has been an appeal from the original decree, the period under the Section is to be computed from the date of the appellate decree even though the appeal was only from a *portion* of the original decree<sup>8</sup>

('81) 6 Cal 201 (202).

#### Note 10

1. (1900) 2 Bom L R 199 (200).
- ('08) 11 Oudh Cas 57 (58, 59).
2. ('97) 1 Cal W N 93 (94).
- ('18) AIR 1918 Bom 217 (218) : 42 Bom 309.
3. ('16) AIR 1916 Cal 482 (483).
- ('24) AIR 1924 Cal 131 (132) : 50 Cal 743.
- ('07) 6 Cal L Jour 462 (465). (Final decree awarding mesne profits.)
- ('18) AIR 1918 All 254 (255) : 40 All 211. (Direction for enquiry into mesne profits—Assumed to operate as a final decree.)
- ('97) 19 All 520 (521). (Order absolute under S. 89 of the Transfer of Property Act now equivalent to a final decree.)
- [But see ('27) AIR 1927 Mad 342 (344). (Decree directing ascertainment of mesne profits in execution—Time runs from date of decree and not from date of ascertainment.)
- ('16) AIR 1916 Mad 288 (290) : 39 Mad 544. (Decree-holder will have 12 years from date of order absolute under S. 89 of the Transfer of Property Act—The decree under S. 88 itself could have been executed within 12 years from the date thereof.)
- Note:—In both the above cases, the decrees were passed under the old Code. The points are not likely to arise under this Code which provides for a preliminary and a final decree in such cases.
- ('22) AIR 1922 Bom 95 (95) : 46 Bom 761. (Mortgage decree under Dekkhan Agriculturists' Relief Act — No necessity for decree absolute — Time runs from date of decree.)]
4. ('35) AIR 1935 Lah 292 (294).

('34) AIR 1934 Oudh 465 (469). (AIR 1932 All 351 Followed.)

('18) AIR 1918 Bom 217 (221) : 42 Bom 309.

('32) AIR 1932 All 351 (352) : 54 All 622. (60 Ind Cas 318 dissented.)

[But see ('21) 60 Ind Cas 318 (319) (Pat).

('26) 99 Ind Cas 204 (205) (Oudh).]

5. ('17) AIR 1917 P C 85 (85) (PC).

('15) AIR 1915 Cal 8 (8).

('16) AIR 1916 Mad 972 (974).

('21) AIR 1921 Cal 456 (456, 457).

('25) AIR 1925 Mad 331 (331).

('28) AIR 1928 Cal 668 (668, 669).

('26) AIR 1926 Mad 954 (955) : 50 Mad 5.

*In view of the Privy Council ruling in AIR 1917 P C 85, the following decisions are no longer law:*

('18) AIR 1918 Mad 1187 (1194) : 40 Mad 989 (FB).

('12) 15 Ind Cas 822 (824) : 36 Bom 368.

[See also ('26) AIR 1926 Mad 20 (28) : 48 Mad 846. (AIR 1918 Mad 1187 (FB) and AIR 1918 Mad 607 were held to be overruled by AIR 1917 P C 85 (PC).)]

6. ('26) AIR 1926 Mad 954 (955) : 50 Mad 5.

('20) AIR 1920 Cal 378 (379).

7. ('89) 13 Bom 567 (570).

('92) 16 Bom 480 (485, 486).

('99) 23 Bom 592 (594).

8. ('03) 26 Mad 91 (93, 95, 96) (F B).

('11) 12 Ind Cas 75 (75) (Mad).

('77) 1 All 508 (509).

('81) 6 Cal 194 (196).

('82) 4 All 274 (276). (It is not necessary that the appeal should be from the original decree in the suit—The appeal may be from decree passed on review.)

and even if the original decree is confirmed in appeal<sup>9</sup> or is dismissed as not pressed.<sup>9a</sup> The same principle applies to cases of appeals to the Privy Council.<sup>10</sup> Where, however, an appeal is preferred where no appeal lies,<sup>11</sup> or where an appeal is withdrawn<sup>12</sup> or is dismissed for default,<sup>13</sup> or is rejected for insufficiency of stamp,<sup>14</sup> time will run only from the *original* decree. Where a decree is passed *severally* against two or more defendants and one of the defendants appeals, the period of twelve years as against the other defendants runs from the date of the original decree.<sup>15</sup> In the light of the decision in A.I.R. 1932 Privy Council 165, the above view might require reconsideration.

Where an application to set aside an *ex parte* decree has been rejected, the period for the execution of the *ex parte* decree runs from the date of the decree notwithstanding the pendency of the application.<sup>16</sup>

It has been held in the undermentioned case<sup>17</sup> that this Section obviously refers to a decree which is *capable of execution* and that in the case of a decree which is not capable of execution except on the happening of a particular contingency, time will not begin to run until that contingency occurs.

**11. Subsequent order, meaning of.** — Where a subsequent order directs payment of money or delivery of property at a future date, the period of twelve years will run from such date.<sup>1</sup> Thus, an order under O. 20 R. 11 (2) will be a subsequent order within the meaning of this Section.<sup>2</sup> According to the High Courts of Allahabad<sup>3</sup>

('83) 9 Cal 100 (102).

('84) 6 All 14 (16).

('86) 8 All 573 (575).

('89) 16 Cal 598 (602, 603).

('92) 19 Cal 750 (755).

('95) 17 All 103 (105).

('95) 22 Cal 467 (472).

('96) 23 Cal 876 (883).

('98) 22 Bom 500 (505, 508).

('98) 25 Cal 594 (601, 602). (FB).

('99) 23 Mad 60 (67, 69).

('07) 1907 Pun Re No. 32, p. 124.

('12) 16 Ind Cas 370 (372) (Cal).

('05) 27 All 501 (504, 505, 508, 509). (FB).

[See however ('78) 2 Cal L Rep 471 (473). (Appeal by one of the defendants with respect to his share not imperilling the whole decree — Time runs against the non-appealing defendants from the original decree.)]

9. ('11) 12 Ind Cas 75 (75) (Mad).

('94) 18 Bom 203 (205).

('10) 5 Ind Cas 473 (474): 32 All 136. (Dismissing appeal on the ground that it had abated, dissenting from 20 All 124 which was a case under the Limitation Act.)

('95) 19 Bom 258 (260).

('09) 2 Ind Cas 364 (364): 31 All 379. (Though appellate decree is the one to be executed, it does not by implication extend the time fixed by original decree for performance of any condition precedent.)

('08) 31 Mad 28 (31, 32). (Such extension must follow impliedly or expressly from the appellate decree.)

('87) 11 Bom 172 (173). (Such extension is a question of intention of the appellate decree.)

9a. ('38) AIR 1938 Pat 401 (402).

('08) 30 All 385 (386, 387).

10. ('80) 2 All 763 (764, 765).

('81) 7 Cal 620 (622, 627).

11. ('26) AIR 1926 All 440 (442, 443): 48 All 377.

[But see ('21) AIR 1921 All 134 (134): 43 All 405.]

12. ('08) 1908 Pun Re No. 54, p. 266.

13. ('18) AIR 1918 Oudh 446 (449).

14. ('84) 6 All 438 (439).

15. ('26) AIR 1926 Cal 664 (664).

('91) 13 All 1 (15, 16) (F B).

('04) 1 All L Jour 409 (411).

('23) AIR 1923 Bom 400 (400). (Decree against A but not against B — Plaintiff appealing for decree against B also — Appeal dismissed — Time against A runs from original decree.)

16. ('92) 16 Bom 123 (125).

17. ('39) AIR 1939 Bom 75 (78): ILR (1939) Bom 87.

Note 11

1. ('09) 1 Ind Cas 48 (49) (Lah).

2. ('21) AIR 1921 Pat 340 (340).

('17) AIR 1917 Mad 188 (188). (But the application under O. 21 R. 11 must have been made within limitation period of Article 175 — Otherwise order of the Court is without jurisdiction and will not save time — However, see AIR 1923 Lah 381 where it was held that as the parties agreed to such an application which was made beyond limitation, the application was good.)

[See ('24) AIR 1924 Lah 342 (344).]

[See also ('25) 21 Mad L W (Jour S R C) 29 (29) (Per Wallace, J.)]

[But see ('08) 18 Mad L Jour 548 (549). (Order under Sec. 257-A of the old Code (now deleted) held not to be a subsequent order.)]

3. ('18) AIR 1918 All 216 (218): 40 All 198.

('32) AIR 1932 All 273 (279, 282, 285): 54 All 573 (F B).

('83) 1883 All W N 147 (147). (Arrangements for paying off decree in instalments not carried out by order of Court.)

[See also ('91) 1891 All W N 12 (13). (Order made without jurisdiction will not save time.)]



and Patna<sup>4</sup> and the Chief Court of Oudh,<sup>4a</sup> a subsequent order must be one passed by the Court which passed a decree *as such* Court and not an order of an *executing* Court. The Bombay High Court<sup>5</sup> has, on the other hand, held that the order may be of *any competent Court* including a Court of execution. The Calcutta<sup>6</sup> and Lahore<sup>7</sup> High Courts and the Courts of the Judicial Commissioner of Nagpur<sup>8-9</sup> and Sind<sup>9a</sup> are also inclined to this latter view.

**12. "At a certain date or at recurring periods."** — Where a decree does not fix a *definite* date the question whether a sum is payable by a certain date should be ascertained by construction of the decree and if so ascertainable, time runs from that date.<sup>1</sup> An order merely directing a compromise petition for payment by instalments to be filed, is not an order directing payments to be made at a *particular date*.<sup>2</sup>

Decrees for payment in instalments, annual or monthly,<sup>3</sup> and decrees for future maintenance,<sup>4</sup> are decrees for payment "at recurring periods." Time in the case of such decrees and of decrees for the payment of money at a particular date, runs from the date of default or the expiry of the period as the case may be.<sup>5</sup> Where an instalment decree provides for the payment of the whole sum in default of any one instalment and either no option is given to the decree-holder or an option is given and exercised by him, time for the execution of the whole decree runs from the date of the *first default*.<sup>6</sup>

In the undermentioned case,<sup>6a</sup> an instalment decree provided that in default of payment of any instalment, the decree-holder was entitled to realise the whole amount of the decree at once. It was held that such a decree could not be considered to be a decree payable "at a certain date" within the meaning of this Section, and that therefore, after 12 years from the date of the default, only that instalment will be barred in respect of which the default was made.

Where a decree is for delivery of possession of immovable property contingent on the non-payment of annuity, the decree-holder is not bound to execute for

4. ('35) AIR 1935 Pat 380 (381) : 14 Pat 816.

('21) AIR 1921 Pat 340 (340).

('18) AIR 1918 Pat 216 (217).

4a. ('36) AIR 1936 Oudh 266 (266) : 12 Luck 244.

5. ('25) AIR 1925 Bom 503 (504) : 49 Bom 695.

6. ('38) AIR 1938 Cal 25 (30) : I L R (1937) 2 Cal 373.

('29) AIR 1929 Cal 687 (689) : 57 Cal 789.

('85) 11 Cal 143 (145).

[But see ('12) 13 Ind Cas 88 (90) (Cal).]

7. ('26) AIR 1926 Lah 465 (466).

('89) 1889 Pun Re No. 200, page. 706. (Arrangement of parties in execution as to satisfaction of decree—Parties cannot be allowed to turn back upon it.)

[But see ('23) AIR 1923 Lah 678 (678). (Where a Court executing the decree records a compromise the original decree is not altered thereby and the period will still be calculated from the date of the decree.)]

8-9. ('31) AIR 1931 Nag 50 (51) : 27 Nag L R 150.

9a. ('39) AIR 1939 Sind 93 (96).

#### Note 12

1. ('91) 14 Mad 396 (398).

('89) 1889 Pun Re No. 159.

2. ('89) 16 Cal 16 (18, 19).

('82) 4 All 155 (156).

('32) AIR 1932 All 273 (282) : 54 All 573 (F B).

3. ('92) 1892 Pun Re No. 13, page. 64 (F B).

(Instalment decree—Execution can be taken for instalments not barred.)

('85) 9 Bom 328 (332).

4. ('87) 9 All 33 (34).

('31) AIR 1931 Bom 492 (494). (Amount of maintenance directed to be determined in execution—Time runs from date of such determination.)

('92) 19 Cal 139 (144, 145, 146) (F B).

('94) 16 All 179 (181).

('95) 22 Cal 903 (908).

('10) 6 Ind Cas 826 (829) : 38 Cal 13.

5. ('94) 1894 Pun Re No. 89.

('88) 12 Bom 65 (67). (Right to execute accruing on a particular day—Limitation should be computed from that day.)

('07) 30 Mad 504 (505).

('24) AIR 1924 All 263 (264) : 46 All 73.

6. ('85) 7 All 373 (375). (Decree by instalments.)

('19) AIR 1919 Cal 322 (323).

('25) AIR 1925 Bom 326 (326).

('31) AIR 1931 Bom 263 (264). (Option given and exercised.)

6a. ('36) AIR 1936 Lah 159 (160).

possession on the occurrence of the first default but might execute it on the occurring of any subsequent default.<sup>7</sup>

Where a decree directs that money be recoverable from a party only on failure to recover the same from another, the period of 12 years runs from the date of decree and not from the time of the failure of the other to make the payment.<sup>8</sup>

**13. Exclusion of time during minority or other disability of decree-holder.** — See Section 6 Note 21 of the Authors' Commentaries on the Limitation Act.

**14. Deduction of time for other causes.** — Where the period of twelve years expires on a day when the Court is closed, the application can be presented on the next re-opening day on the broad principle that where the parties are prevented from doing a thing by the act of the Court they are entitled to do it at the first subsequent opportunity.<sup>1</sup>

As to whether the Sections of the Limitation Act extending the period of limitation "prescribed" apply to the period of twelve years under this Section, see the Authors' Commentaries on the Limitation Act<sup>2</sup> and the undermentioned cases.<sup>2a</sup>

In cases of intervening insolvency of the judgment-debtor the period during which the adjudication lasts will be excluded in computing the period of twelve years under this Section.<sup>3</sup>

By virtue of Section 48 of the Dekkhan Agriculturists' Relief Act, 1879, the time spent in obtaining the conciliator's certificate can be deducted in computing the period of limitation under this Section.<sup>4</sup>

Where property is under the management of the Collector under Schedule III of the Code, the period of such management can be excluded under Para. 11 (3) of Schedule III in calculating the "period of limitation" applicable to the execution of any decree in respect of any remedy of which the decree-holder has been temporarily deprived. The expression "period of limitation" has been interpreted as including the period fixed by Section 48.<sup>5</sup> But Para. 11 (3) only applies when the decree has been transferred to the Collector for execution<sup>6</sup> and only in respect of any remedy of which the decree-holder is temporarily deprived.<sup>7</sup>

The pendency of an appeal by the judgment-debtor is not a ground of suspension of the period prescribed by this Section in the absence of fraud or force.<sup>8</sup> When a decree is conditional on the redemption of a prior mortgage and the decree-holder redeemed the prior mortgage after twelve years from the date of his decree, the period up to the date of the redemption is not excluded, as nothing prevented him from redeeming it earlier and applying for execution within time.<sup>9</sup>

7. ('94) 16 All 237 (238, 239).

8. ('26) AIR 1926 Mad 20 (23) : 48 Mad 846.

**Note 14**

1. ('91) 18 Cal 631 (634).

('85) 7 All 107 (108).

('99) 22 Mad 179 (182).

('16) 3 Cal L Jour 339 (343).

2. See Note 3 to S. 4; Note 3 to S. 15; Note 15 to S. 19; Note 10 to S. 20.

2a. ('39) AIR 1939 All 403 (405, 412) (F B). (Following 1 Cal 226 (P C).)

('39) AIR 1939 Bom 75 (77) : 1 L R (1939) Bom 87. (Dissenting from AIR 1922 Mad 268.)

3. ('39) AIR 1939 Mad 270 (272).

('21) AIR 1921 Cal 456 (457).

('12) 16 Ind Cas 541 (542) (Cal).

('32) AIR 1932 Oudh 69 (71):7 Luck 397. (S. 48 is controlled by S. 78(2), Provincial Insolvency Act.)

4. ('18) AIR 1918 Bom 187 (188) : 42 Bom 367.

5. ('37) 1937 Oudh W N 1116 (1117).

('34) AIR 1934 Oudh 465 (470).

('19) AIR 1919 All 64 (65) : 42 All 118.

('10) 8 Ind Cas 377 (378) : 13 Oudh Cas 303.

[See also ('95) 19 Bom 261 (267, 268). (Remittances by Collector—Step-in-aid.)

6. ('15) AIR 1915 Mad 449 (451).

('16) AIR 1916 Mad 972 (972).

7. ('15) AIR 1915 Nag 103 (106) : 11 Nag L R 25.

8. ('17) AIR 1917 Cal 460 (461).

9. ('13) 18 Ind Cas 897 (897) (All).

8

15. "By fraud or force." — Sub-section (2) (a) of this Section permits the execution of a decree at any time within twelve years after the date on which the judgment-debtor has by fraud or force prevented the execution of a decree in an application properly made for execution. In other words, fraud or force which prevents execution gives a fresh period of twelve years within which the decree may be executed.<sup>1</sup> In order to get the benefit of this sub-section it must be proved that —

(1) there was fraud or force on the part of the judgment-debtor,<sup>2</sup> and

(2) the decree-holder was thereby prevented from executing the decree.<sup>3</sup>

The fraud however need not be such as to have continued to prevent execution up to the expiry of the twelve years.<sup>4</sup> There is a conflict of opinion on the question whether the Court has any discretion to refuse execution even when fraud or force on the part of the judgment-debtor preventing execution is established within twelve years of the application. According to the Calcutta High Court<sup>5</sup> the Court has such discretion which will be exercised in favour of the decree-holder if he had been *diligent* in proceeding with the execution of the decree from the date of the decree. The Madras High Court is, on the other hand, inclined to the view that no such discretion exists under the Section.<sup>6</sup> The Oudh Judicial Commissioner's Court has held<sup>7</sup> that even in the view of the Calcutta High Court stated above, the due diligence required is nothing more than keeping the decree alive under the provisions of the Code. It is submitted with respect that the Madras view is correct. The language of the sub-section makes it clear that sub-section (1) which precludes the Court from ordering execution in the cases specified does not bar an application made after the specified period if the conditions mentioned in sub-section (2) are satisfied. There is nothing to show that the Court has any *discretion* in the matter.

The term "fraud" in the Section should be interpreted in a very liberal sense.<sup>8</sup> Any improper means resorted to by the judgment-debtor to prevent execution of the decree would amount to such fraud.<sup>9</sup> The term includes not merely deceit but also circumvention.<sup>10</sup> But mere objections by the judgment-debtor cannot be taken advantage of as "fraud" within the meaning of this Section.<sup>11</sup> In the case noted below<sup>11a</sup> an objection raised to the jurisdiction of the Court was held not to amount to fraud.

#### Note 15

1. ('99) 22 Mad 320 (322, 323).

('11) 11 Ind Cas 672 (672) : 34 All 20.

('20) AIR 1920 Nag 68 (69).

('10) 8 Ind Cas 805 (805) (Mad.)

2. ('10) 8 Ind Cas 805 (805) (Mad.)

('35) AIR 1935 Mad 8 (11) : 58 Mad 311. (Fraud committed by judgment-debtor—Decree-holder can avail of it against legal representative.)

[See also ('32) AIR 1932 All 273 (277, 284) : 54 All 573 (F B).]

3. ('35) AIR 1935 Pat 380 (382) : 14 Pat 816.

('29) AIR 1929 Pat 597 (599).

('98) 8 Mad L Jour 203 (204).

('09) 4 Ind Cas 958 (959) (Lah.).

('12) 13 Ind Cas 88 (89) (Cal.).

('19) AIR 1919 Mad 197 (198).

[But see ('35) AIR 1935 Mad 8 (11) : 58 Mad 311. (Case law of Madras High Court discussed.)]

4. ('11) 12 Ind Cas 793 (795) : 14 Oudh Cas 238.

('97) 1 Cal W N clxii.

('99) 22 Mad 320 (322, 323).

('19) AIR 1919 Mad 197 (198).

5. ('06) 11 Cal W N 440 (441).

6. ('11) 12 Ind Cas 679 (681) : 35 Mad 670. (Even assuming due diligence is necessary, continuous diligence during all the time prior to the application need not be shown.)

7. ('11) 12 Ind Cas 793 (795) : 14 Oudh Cas 238.

8. ('12) 18 Ind Cas 1008 (1008) (Mad).

('12) 13 Ind Cas 88 (89) (Cal.). (The term "fraud" in S. 48 should be interpreted in a wider sense than that in which it is used in English law.)

('31) AIR 1931 All 31 (33).

('11) 12 Ind Cas 679 (680) : 35 Mad 670.

9. ('36) AIR 1936 Lah 843 (845). (Frivolous objection taken by the judgment-debtor was held to amount to fraud.)

('19) 18 Ind Cas 1008 (1008) (Mad).

10. ('36) AIR 1936 Lah 843 (845).

('27) AIR 1927 All 668 (669).

11. ('35) AIR 1935 Pat 380 (382) : 14 Pat 816.

('27) AIR 1927 All 668 (669).

('31) AIR 1931 All 134 (134) : 53 All 419.

11a. ('36) AIR 1936 Lah 843 (845).

But raising a plea based on a false statement would be fraudulent.<sup>11b</sup> Where there are frequent futile and false objections raised by the judgment-debtor accompanied by his keeping out of the way when warrants of arrest are issued, his conduct may be taken to amount to fraud.<sup>12</sup> In the following instances the conduct of the judgment-debtor has been held to amount to fraud within the meaning of the Section —

- (1) Where he raised frivolous objections in order to delay execution of the decree against him.<sup>13-14</sup>
- (2) Where he wilfully evaded the arrest warrant.<sup>15</sup>
- (3) Where, knowing that a warrant of attachment was issued against his moveable property, he locked up his house and so prevented the moveable property therein being attached.<sup>16</sup>
- (4) Where he or his heirs made fictitious and fraudulent alienation of property which was subsequently set aside in a regular suit.<sup>17</sup>
- (5) Where he kept out of British India so that the decree-holder was not in a position to take out execution against his person.<sup>18</sup>

Where the Court merely refused to permit execution against properties of the judgment-debtor in the hands of a receiver but it was open to the decree-holder to proceed against the person and other properties of the judgment-debtor or of the surety and he did not do so within the twelve years, it was held that Section 48 (2) was of no help to the decree-holder.<sup>19</sup>

Fraud or force of one judgment-debtor will not extend the time against a co-judgment-debtor who did not resort to it.<sup>20</sup>

**16. Appeal from orders under the Section.** — An order granting or refusing execution of a decree under the Section is, it is conceived, a final order amounting to a decree under Section 47 and is therefore appealable.

**17. Plea of bar under the Section, when to be raised.** — Where notice of petition for attachment in execution is duly served on the judgment-debtor who allows orders to be passed *ex parte*, he cannot ask for a review of the order, nor can he in appeal raise the plea that the execution application is barred by the expiry of the

11b. ('36) AIR 1936 Lah 843 (845). (But mere raising of objections so as to prolong execution proceedings beyond the period of limitation is not necessarily fraud.)

12. ('12) 13 Ind Cas 929 (929) (All).

('83) 6 Mad 365 (367).

('09) 2 Ind Cas 222 (223) (All).

13-14. ('11) 12 Ind Cas 793 (794, 795): 14 Oudh Cas 238. (It is sufficient to show that the judgment-debtor on various occasions within the aforesaid period dishonestly prevented the execution of the decree against him by frivolous devices.)

('34) AIR 1934 Pat 532 (533). (The judgment-debtor fraudulently setting up a claimant to the attached property—Claim set aside by separate suit.)

('22) AIR 1922 All 145 (146): 44 All 319.

('17) AIR 1917 Oudh 69 (71).

[But see ('12) 13 Ind Cas 88 (89) (Cal). (The mere fact that the judgment-debtor objects to

a sale which objection ultimately proves unsuccessful will not amount to fraud.)]

15. ('20) AIR 1920 Mad 492 (493).

('24) AIR 1924 Mad 836 (837).

('12) 13 Ind Cas 929 (929) (All).

16. ('85) 9 Bom 318 (319).

('99) 22 Mad 320 (322, 323).

[But see ('17) AIR 1917 Oudh 159 (160). (Keeping the doors closed is per se no evidence at all of fraudulent conduct on the part of a lady, unless there is anything to show that she deliberately does so or attempts to do so against the executing officer.)]

17. ('82) 4 Mad 292 (294).

18. ('25) AIR 1925 Nag 82 (90): 22 Nag L R 67.

19. ('29) AIR 1929 Pat 597 (599).

20. ('16) AIR 1916 Mad 1 (2): 38 Mad 419.

('31) AIR 1931 Mad 381 (383).

('30) AIR 1930 Sind 218 (219).

twelve years under the Section.<sup>1</sup>

Where an executing Court decides that the execution of a decree is not barred, notwithstanding the provisions of this Section, it is merely an erroneous decision and not an illegal exercise of jurisdiction. Therefore, so long as the order is not set aside in appeal or revision, it cannot be attacked in any collateral proceeding on the ground of want of jurisdiction in the executing Court.<sup>2</sup>

## TRANSFEREES AND LEGAL REPRESENTATIVES

**Transferee.**

**49. [S. 233.]** Every transferee of a decree shall hold the same subject to the equities (if any) which the judgment-debtor might have enforced against the original decree-holder.

[1877, S. 233. See O. 21 R. 16.]

### *Synopsis*

1. Scope and object of the Section.
2. Equity of the judgment-debtor to set off cross-decree.
3. Transferee during pendency of suit by judgment-debtor takes it subject to the result of the suit.
4. Other equities enforceable against the assignee.
5. Assignee's want of knowledge of equity, if affects rule.

### *Other Topics*

Assignment before or during appeal. See Note 3.

Assignee bound by S. 99, T. P. Act. See Note 4.

**1. Scope and object of the Section.** — This Section may be compared with Section 132 of the Transfer of Property Act, 1882, which is based on the same principle,<sup>1</sup> namely, that the assignee of a claim stands in no better position than the assignor as regards equities existing between the assignor and his debtor at the time of the assignment.<sup>1a</sup> An attaching decree-holder is an "assignee" of the attached decree within the meaning of O. 21 R. 16 and is, under this Section, subject to the same equities that the judgment-debtor in attached decree had against his decree-holder.<sup>2</sup> The equity, to which a transfer of a decree is subject, must, however, be one available against the *original decree-holder* and not one available against others.<sup>3</sup> A mere *claim* for restitution made by the judgment-debtor against the original decree-holder is not an equity which can be availed of against an assignee from the decree-holder.<sup>4</sup> The equity which the judgment-debtor seeks to enforce against the transferee must have been existent at the date of the assignment.<sup>5</sup>

#### **Note 17**

1. ('29) AIR 1929 Mad 826 (826, 827).

[But see ('38) AIR 1938 All 89 (90). (Objection as to bar not raised on notice of application for execution—Objection to confirmation of sale on the ground that execution was barred by limitation, allowed to be raised.)]

2. ('34) AIR 1934 Cal 282 (283): 61 Cal 234.

#### **Section 49 — Note 1**

1. Section 132 of the Transfer of Property Act runs as follows: "The transferee of an actionable

claim shall take it subject to all the liabilities and equities to which the transferor was subject in respect thereof at the date of transfer."

- 1a. ('10) 7 Ind Cas 55 (59, 60) (Cal). (Fraudulent assignment.)

('74) 21 Suth W R 141 (143).

2. ('25) AIR 1925 Cal 102 (103).

3. ('25) AIR 1925 Pat 449 (450): 4 Pat 120.

4. ('33) AIR 1933 Cal 865 (868).

5. ('38) AIR 1938 Bom 253 (255, 256): 1 L R (1938) Bom 263.

**2. Equity of the judgment-debtor to set off cross-decree.** — A right to set off a cross-decree or cross-claim under O. 21 Rr. 18 and 19 is an equity which can be enforced against the transferee of the decree,<sup>1</sup> but the decree against which the set-off is asked for must be before the Court for execution<sup>2</sup> and it is *that* Court that should consider whether the assigned decree is subject to any equities.<sup>3</sup> A right to set off a cross-decree is not affected when the assignment of one of them has been found to be fraudulent.<sup>4</sup>

**3. Transferee during pendency of suit by judgment-debtor takes it subject to the result of the suit.** — An assignee of a decree which, subsequent to the assignment, is confirmed on appeal without the assignee being brought on the record, is nevertheless an "assignee" within O. 21 R. 16 who can execute the appellate decree<sup>1</sup> but a satisfaction entered on the decree under O. 21 R. 18 is binding on him though made subsequent to the assignment to him and before his name is brought on the record.<sup>2</sup> The right of a judgment-debtor to ask for a stay under O. 21 R. 29, *infra* is an equity which will bind an assignee of the decree.<sup>3</sup> Hence, where the decree is assigned during the pendency of a suit by the judgment-debtor against the decree-holder and a decree is passed subsequently in the later suit in favour of the judgment-debtor, the latter will be entitled to a set-off in respect of such decree against the transferee of the decree in the prior suit.<sup>4</sup>

**4. Other equities enforceable against the assignee.** — In cases coming under Section 99 of the Transfer of Property Act, 1882, a mortgagee who had also a money decree against the mortgagor could not, in execution of the *money* decree, bring the equity of redemption to sale. It was held by the Bombay, Calcutta and Madras High Courts that the assignee of such money decree could not also bring the equity of redemption to sale and thus deprive the mortgagor of his equitable right.<sup>1</sup> The Allahabad High Court, however, held a contrary view.<sup>2</sup> Section 99 of the Transfer of Property Act, 1882, has now been repealed and re-enacted in O. 34 R. 14 of the Code but with this difference, namely, that the equity of redemption could not be sold now in execution of decrees for the payment of money in satisfaction of *such claims only as arise under the mortgage*. The cases cited above are, therefore, now no longer law.

See Notes to Order 34 Rule 14, *infra*.

**5. Assignee's want of knowledge of equity, if affects rule.** — An assignment takes effect against the *debtor* only on notice to him and is subject to all

**Note 2**

1. ('37) AIR 1937 All 351 (352) : I L R (1937) All 553. (This Section is not inconsistent with O. 21 R. 18 and even if it is so, this Section will prevail.)
- ('36) 163 Ind Cas 618 (619).
- ('68) 10 Suth W R 32 (33) (F B).
- ('73) 19 Suth W R 85 (87).
- ('72) 18 Suth W R 442 (443).
- ('89) 16 Cal 619 (622).
- ('24) AIR 1924 Nag 46 (47) : 19 Nag L R 164.
2. ('02) 24 All 481 (482).
3. ('37) AIR 1937 Cal 570 (571).
- ('19) AIR 1919 Mad 424 (426) : 42 Mad 338. (Since so to determine is a stage in execution of the decree.)
4. ('67) 7 Suth W R 470 (471).

**Note 3**

1. ('18) AIR 1918 Mad 279 (280). (Because transfer of decree means transfer of interest in it as finally determined.)
2. ('97) 7 Mad L Jour 227 (229).
3. ('38) AIR 1938 Bom 253 (256) : I L R (1938) Bom 263.
4. ('38) AIR 1938 Bom 253 (256) : I L R (1938) Bom 263.
- ('37) AIR 1937 Rang 316 (317). (Want of notice on assignee's part of the pending suit is not material.)

**Note 4**

1. ('07) 31 Bom 462 (463, 464). (What law prohibits directly cannot be effected indirectly.)
- ('95) 22 Cal 813 (816). (Otherwise would defeat object of S. 99, T. P. Act, 1882.)
- ('07) 31 Mad 33 (34).
2. ('05) 27 All 450 (452).

equities arising prior to the date of such notice;<sup>1</sup> but it is not necessary that the assignee should have any notice of the equity which the debtor could have asserted against the transferor,<sup>2</sup> though the case would be very much stronger against the assignee if he had such notice.<sup>3</sup>

**50.** [S. 234.] (1) Where a judgment-debtor dies<sup>10</sup> before the decree has been fully satisfied,<sup>12</sup> the holder

Legal representative.

of the decree<sup>3</sup> may apply to the Court which passed it to execute the same against the legal representative<sup>4</sup> of the deceased.

(2) Where the decree is executed against such legal representative, he shall be liable only to the extent<sup>6</sup> of the property of the deceased<sup>8</sup> which has come to his hands and has not been duly disposed of; and, for the purpose of ascertaining such liability, the Court executing the decree may, of its own motion or on the application of the decree-holder, compel such legal representative to produce such accounts as it thinks fit.

[ 1877, S. 234; 1859, S. 210. See Order 21 Rule 22.]

### Synopsis

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| <ol style="list-style-type: none"> <li>1. Legislative changes.</li> <li>2. Scope of the Section.</li> <li>3. "Holder of the decree."</li> <li>4. "Legal representative." See O. 22 R. 3.</li> <li>5. Appeal against order determining legal representative.</li> <li>6. Extent of liability of legal representative. See Note 13 to Section 52.</li> <li>7. Legal representative bound by what the deceased judgment-debtor himself would have been bound by.</li> <li>8. "Property of the deceased." See Section 52 Note 9 and Section 53 Note 6.</li> <li>9. Official Assignee. See Note 10.</li> <li>10. "Where a judgment-debtor dies."</li> <li>11. Decree against deceased defendant. See Note 8 to Section 52.</li> </ol> | <ol style="list-style-type: none"> <li>12. "Before the decree has been fully satisfied."</li> <li>13. Application to execute against the legal representative.</li> <li>14. Execution against wrong legal representative or without the legal representative.</li> <li>15. Decree-holder, if can proceed against property in the possession of third party.</li> <li>16. Limitation for substitution of legal representative.</li> <li>17. Successive deaths of judgment-debtor and legal representative.</li> <li>18. Decree for injunction.</li> <li>19. Appeals.</li> </ol> |
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**1. Legislative changes.** — Besides some verbal changes, the words "fully satisfied" have been substituted for the words "fully executed" in clause (1) of this Section. See Note 12 below.

**2. Scope of the Section.** — This Section and Sections 52 and 53 may be usefully read together. Section 52 contemplates cases where the debtor dies *before the decree* and the *decree itself* has been passed against the legal representative. This will

#### Note 5

1. ('02) 26 Mad 428 (429).  
(1886) 26 S C 33, Sutton v. Sutton.
2. ('38) AIR 1938 Bom 253 (256) : I L R (1938) Bom 263.

- ( '37) AIR 1937 Rang 316 (317).
- ( '11) 12 Ind Cas 205 (206) (Low Bur).
- ( '10) 7 Ind Cas 55 (60) (Cal).
3. ('89) 16 Cal 619 (622).

also include cases where the debtor dies *before suit* and the suit itself is instituted against the legal representative. This Section provides for the *execution* of decrees against the legal representatives of a judgment-debtor who dies before the decree has been fully satisfied. Normally, it applies to cases where judgment-debtor dies after the decree. But the Section is wide enough to include the case where the judgment-debtor dies before decree, provided the decree is *valid in spite of his death*, e.g., where under O. 22 R. 6 death occurs after hearing but before judgment, or in the case of Privy Council appeals.<sup>1</sup> Section 53 extends the scope of Sections 50 and 52 to ancestral property in the hands of a descendant which is liable under the Hindu law for payment of debts of the ancestor.

**3. "Holder of the decree."** — For the definition of "decree-holder," see Section 2 sub-section (3). A person who appears upon the face of the decree as the person in whose favour the decree is passed is entitled to execute it, unless it is shown that some other person has taken his place.<sup>1</sup> The Code does not provide that execution abates by death of decree-holder.<sup>2</sup> See also O. 22 R. 12 *infra*. For purposes of limitation, an application for execution by any person who, for the time being, is recognised as the proprietor of the estate of a deceased decree-holder is held to be good, though later on it is found that he had no title.<sup>3</sup>

**4. "Legal representative."** — See Order 22 Rule 3.

**5. Appeal against order determining legal representative.** — An order determining the question whether a person is the legal representative of a deceased party is within Section 47 and is appealable as a decree. See Section 47 sub-section (3), and Note 26 to that Section. If, however, the Court does not *decide* the question, the mere placing of the legal representative on the record is not appealable.<sup>1</sup>

Where a legal representative is brought on the record in the place of a deceased party, he becomes a party to the suit<sup>2</sup> and all further questions in execution between him and the opposite party must be decided in execution and not by a separate suit and an appeal will lie from such a decision.<sup>3</sup>

**6. Extent of liability of legal representative.** — See Note 13 to Section 52.

**7. Legal representative bound by what the deceased judgment-debtor himself would have been bound by.** — The liability of the legal representative is co-extensive with that of the deceased judgment-debtor himself, subject, however, to the condition that it does not extend beyond the assets actually received by him *and which have not been duly disposed of*. Thus, where the property could not be proceeded against even when in the hands of the judgment-debtor, as where it is governed by the special provisions of the Dekkhan Agriculturists' Relief Act, it cannot be proceeded against when it comes into the hands of the legal representative.<sup>1</sup> On the other hand,

#### Section 50 — Note 2

1. ('37) AIR 1937 Pat 321 (322): 16 Pat 316.
- ('32) AIR 1932 Pat 261 (262, 263, 264): 11 Pat 445.

#### Note 3

1. ('91) 18 Cal 639 (641). (Or may order to make over proceeds to any other person.)
2. ('78) 3 Bom 221 (222).
- (1900) 2 Bom L R 887 (888).
3. ('18) AIR 1918 Pat 216 (216, 217).

#### Note 5

1. ('78) 3 Cal 708 (709, 710).
- ('93) 1893 All W N 106 (107).
- [See ('23) AIR 1923 Pat 149 (150). (Impleading

legal representative without deciding his liability for decree held illegal.)]

2. ('72) 18 Suth W R 185 (188).
- ('84) 7 Mad 255 (257, 258).
3. ('22) AIR 1922 Bom 280 (280).
- (1900) 2 Bom L R 887 (888).

#### Note 7

1. ('21) AIR 1921 Sind 29 (31, 32, 33, 34): 15 Sind L R 47.
- [See also ('25) AIR 1925 Nag 449 (450). (By S. 11 (2) of the Central Provinces Act, 1920, no sale of such tenancy is valid except in special circumstances.)]



the legal representative will be bound by the decree passed or the previous proceedings taken, against the judgment-debtor himself.<sup>2</sup> Thus, where the properties had been attached or charged or mortgaged, or directed to be sold by the decree, in the lifetime of the judgment-debtor, they continue to be liable in the hands of the legal representatives.<sup>3</sup> Similarly, where the judgment-debtor was impleaded in the suit as a subsequent mortgagee but did not plead his rights of marshalling, it is not open to his legal representatives, when substituted in execution proceedings, to raise the question again.<sup>4</sup> A Hindu son or a descendant of a Hindu is liable just like other legal representatives, and cannot question the validity of the decree against the ancestor,<sup>5</sup> except in one respect, namely, that the decree debt is of an illegal or immoral nature so as not to bind him or his share in the joint family property under the Hindu law. See Section 53, Notes 1 and 3, *infra*.

8. "Property of the deceased." — See Section 52 Note 9 and Section 53, Note 6.

9. Official Assignee. — See Note 10 below.

10. "Where a judgment-debtor dies." — This Section applies only where the judgment-debtor dies.<sup>1</sup> The word "dies" is used in its natural meaning and does not include a *civil death*.<sup>1a</sup> Consequently, the Section has no application where the judgment-debtor only becomes an insolvent or has only alienated or gifted away his property, or where, in his lifetime, there is a transfer or devolution by operation of law. After property vests in the Official Assignee, no proceedings can affect the property of the deceased insolvent in his hands unless he has been impleaded in the matter adjudicated upon.<sup>2</sup> Since attachment does not create any interest in the property and prevents only a private alienation, it does not prevail against the Official Assignee or Official Receiver and the decree-holder cannot claim payment of the money realised,<sup>3</sup> much more so if the attachment is only prior to judgment.<sup>4</sup>

11. Decree against deceased defendant. — See Note 8 to Section 52.

12. "Before the decree has been fully satisfied." — The word "satisfied" has been substituted in this Code for the word "executed" in the previous Codes. Prior to this Code, there was a conflict of views amongst the High Courts as to the meaning

('69) 12 Suth W R 495 (495). (A decree to give accounts within specified time—No execution till expiry of the period—Death thereafter—Cannot be executed against legal representative.)

('19) AIR 1919 Lah 145 (146): 1919 Pun Re No. 17 (F B). (A case under Punjab custom.)]

2. ('18) AIR 1918 Pat 41 (46): 4 Pat L Jour 213.

('86) 10 Bom 74 (77).

('89) 21 All 277 (279).

3. ('01) 24 Mad 689 (694).

('09) 31 All 45 (47). (Mortgage decree against widow—Reversioner as her legal representative cannot plead in execution the invalidity of mortgage or decree.)

('99) 21 All 356 (358, 359). (Mortgage decree against Hindu father covering whole family property — Son as legal representative cannot object in execution that his share is not liable.)

4. ('16) AIR 1916 Oudh 288 (288, 289).

5. ('93) 16 Mad 99 (103).

('11) 9 Ind Cas 648 (649) (Mad).

Note 10

1. ('14) AIR 1914 Mad 328 (330): 38 Mad 1120.

(Property obtained by son on partition—Not "assets" within this Section so long as the father is alive.)

1a. ('35) AIR 1935 Cal 713 (714).

('31) AIR 1931 All 306 (307): 53 All 529.

[See also ('03) 30 Cal 961 (964). (Transfer of all its properties by one limited company to another—Former company cannot be said to have died.)]

2. ('35) AIR 1935 Mad 907 (907, 908). (Property of a person who is adjudicated an insolvent vests in the Official Receiver from the date on which the person applies for insolvency.)

('29) AIR 1929 Mad 609 (611).

('14) AIR 1914 P C 129 (130, 131): 42 Cal 72:41 Ind App 251 (P C).

[But see ('70) 14 Suth W R 33 (35, 36) (F B). (Not good law: see 29 Cal 428 (F B).)]

3. ('85) 8 Mad 554 (556).

('02) 29 Cal 428 (432, 433) (F B).

See also S. 64, Notes 10 and 14.

4. ('84) 10 Cal 150 (157, 158) (F B).

certain powers for the purposes of the Section. Now the executing Court may be the Court which passed the decree or it may be the Court to which it is sent for execution.<sup>2</sup> The application to execute the decree against the legal representative must under cl. (1) be made to the Court *which passed the decree*.<sup>3</sup> The Section, however, does not specify which Court has to *pass orders thereon*. At any rate the Court that passed the decree need only decide one point, viz., whether the decree is executable against the legal representative, and pass orders accordingly.<sup>4</sup> All further proceedings, inclusive of ordering notice of execution can, where the decree is sent to another Court for execution, be taken by the Court executing the decree.<sup>5</sup> As to the effect of non-compliance with the rule that the application for substitution should be made to the Court which passed the decree, see Section 42, Note 1 *ante*. See also the case cited below.<sup>6a</sup> The execution proceedings once commenced can be continued after the death of the judgment-debtor by substitution of the name of his legal representative in place of his name in the application for execution. No fresh or substantive application under O. 21 R. 11 is necessary.<sup>6</sup>

An application under this Section is necessary only when *further* execution is needed or asked for. A separate application merely for substituting a legal representative is not necessary<sup>7</sup> and no limitation is prescribed for such substitution in execution proceedings which do not abate merely by the death of the parties.<sup>8</sup> See O. 22 R. 12.

It is not incumbent on a party, to be entitled to apply under O. 9 R. 13 of the Code as the legal representative of the deceased defendant, to be first brought on record under Section 50 before filing an application to set aside the *ex parte* decree.<sup>9</sup>

**14. Execution against wrong legal representative or without the legal representative.** — It has been seen in Note 63b to Section 11, *ante*, that a decree against one of several representatives will, in the absence of fraud or collusion, bind all the representatives, but that a decree against a *wrong person* as the legal representative does not bind the real representatives. The same principles will apply to execution proceedings taken against legal representatives. Thus, a proceeding taken

2. See Sections 37 and 38 *supra*.

3. ('37) AIR 1937 Pat 239 (241). (A I R 1928 P C 162 relied on).

('84) AIR 1934 Bom 215 (216). (Application to bring on record legal representatives of judgment-debtor is to be made to the Court passing the decree and not to the Court to which decree is sent for execution.)

('05) 28 Mad 466 (471, 472) (F B).

('95) 17 All 431 (432).

('94) 18 Bom 224 (226). (Although notice to party be sent by execution Court.)

('07) 17 Mad L Jour 300 (301). (Order passed by execution Court not void if objection waived by parties.)

('12) 17 Ind Cas 293 (294) (Mad).

('26) AIR 1926 Mad 411 (412).

4. ('05) 28 Mad 466 (470).

('95) 17 All 431 (432). (Execution Court may determine extent of legal representative's liability.)

('26) AIR 1926 Mad 411 (412).

('28) AIR 1928 Rang 40 (42) : 5 Rang 775. (The order permitting execution against the legal representatives can be made *ex parte*.)

5. ('94) 18 Bom 224 (226).

5a. ('38) AIR 1938 Rang 385 (387). (Question as to whether application to add legal representa-

tive of a deceased judgment-debtor should be made to the Court passing decree or to Court which is executing decree is one of procedure and not one of jurisdiction — In case of non-compliance with procedure the defect might be waived.)

6. ('36) AIR 1936 Bom 456 (457).

('09) 4 Ind Cas 839 (841) : 34 Bom 142.

('31) AIR 1931 Mad 303 (312).

('05) 2 Cal L Jour 544 (545).

('30) AIR 1930 Sind 16 (17).

See also Note 4 to Section 146 *infra*.

7. ('36) AIR 1936 Oudh 152 (153) : 11 Luck 500.

('21) AIR 1921 Mad 693 (693). (Execution was unnecessary for 20 years — Decree-holder not barred.)

[See also ('33) AIR 1933 Mad 568 (568, 569).

(Application for execution against legal representative under this Section need not contain a prayer for substitution of the legal representative on the record.)]

8. ('20) AIR 1920 All 171 (172) : 42 All 570.

9. ('25) AIR 1925 Oudh 370 (371) : 27 Oudh Cas 299. (Provisions of S. 146 the same.)

[But see ('05) 28 Mad 361 (362). (Under old Code and not good law now in view of S. 146.)]

against one of several representatives who *prima facie* is entitled to represent the estate of the deceased is binding on all the representatives.<sup>1</sup> But if it is taken against a *wrong person* as such legal representative, it will as a general rule not bind the actual or real legal representatives.<sup>2</sup> (See also Note 6 to Section 52.) Where, however, in such a case the real representative stands by and allows the proceedings to be taken or continued against a *wrong person who is allowed to be in possession* of the estate of the deceased, he and persons claiming through him will not be allowed to challenge the proceedings subsequently.<sup>3</sup>

Similarly, where a wrong person is impleaded as a legal representative but the Court decides that he is the true heir and orders execution to proceed, such proceedings cannot be said to be void for want of jurisdiction.<sup>4</sup>

Another class of cases may be noted in this connexion, namely, cases where one person is competent, in law, to represent the interest of others in the estate, as for instance, a Hindu father or manager of a joint Hindu family, or the guardian of a minor, or a Hindu widow; in all these cases the proceedings taken against such persons in their representative capacity are binding on all persons who are represented by the person against whom such proceedings are taken.<sup>5</sup> But if the proceedings are

#### Note 14

1. ('79) 4 Cal 342 (345).  
('09) 4 Ind Cas 1059 (1060) : 33 Mad 6.  
('17) AIR 1917 Mad 979 (980, 981). (Position justified on the analogy of S. 11, Expl. 6.)  
('16) AIR 1916 Mad 1022 (1024). (Representation must be without fraud and collusion.)  
('25) AIR 1925 Oudh 330 (331, 334, 336, 337) : 28 Oudh Cas 177. (The same law applies to Mahomedans also.)  
('03) 30 Cal 1044 (1057 to 1059). (Residuary legatee in possession.)  
('89) 12 Mad 90 (91).  
('03) 26 Mad 230 (234).  
[But see ('79) 4 Cal 142 (156) (F B).  
('82) 11 Cal L R 268 (272).]
2. ('05) 32 Cal 296 (315) : 32 Ind App 23 (P C).  
('10) 32 All 404 (409).  
('10) 6 Ind Cas 627 (629) (Cal).  
('11) 12 Ind Cas 915 (918) : 34 All 79.  
('85) 9 Bom 86 (93). (But legal representatives must not wilfully put forward 'wrong person' as legal representatives.)  
('85) 9 Bom 429 (432). (Decree against widow when minor son ignored — Widow does not represent minor son.)  
('97) 21 Bom 424 (451) (F B).  
('13) 18 Ind Cas 381 (382) (Bom).  
('95) 22 Cal 903 (903).  
(1900) 27 Cal 242 (258).  
('13) 21 Ind Cas 519 (519) (Cal).  
('16) AIR 1916 Cal 661 (662).  
('19) AIR 1919 Cal 831 (833).  
('22) 70 Ind Cas 886 (887) (Cal).  
('88) 11 Mad 408 (410, 411).  
('16) AIR 1916 Mad 726 (727).  
(1894) 1894 App Cas 437 (442), Mohamadu Mohideen v. Pitchay. (Creditor of deceased debtor cannot sue unless a person intermeddles with estate or proves a will.)  
('12) 16 Ind Cas 690 (691, 692) (Cal).  
('05) 2 Cal L Jour 484 (486, 487, 483, 483).

- ('09) 2 Ind Cas 818 (819) (Cal). (Case under Probate and Administration Act.)  
('02) 4 Bom L R 340 (341).  
('17) AIR 1917 Mad 979 (980, 981).  
('21) AIR 1921 Bom 385 (388, 389) : 45 Bom 1186. (Sale in absence of and without notice to legal representatives.)  
('81) 6 Cal 777 (784, 785). (Where on widow's death a person is impleaded as her legal representative without deciding if he was really so or not.)
3. ('79) 3 Cal L Rep 157 (158).  
('79) 4 Cal 342 (345, 346).  
[See also ('16) AIR 1916 Mad 1022 (1024). (Wrong representative bona fide sued—Legatee was held bound by decree.)]
4. ('01) 25 Bom 337 (347) : 27 Ind App 216 (P C). (Because Court has jurisdiction to decide wrong as well as right.)  
('25) AIR 1925 Oudh 330 (334) : 28 Oudh Cas 177. (Decree against ostensible owner binds true owner.)  
('26) AIR 1926 Oudh 613 (614). (25 Bom 337 (P C), Followed.)
5. ('72) 24 Suth W R 109 (109).  
('81) 3 All 517 (519). (For limitation purposes.)  
('88) 12 Bom 48 (50). (Do).  
('88) 12 Bom 101 (103).  
('90) 14 Bom 597 (603). (Manager.)  
('96) 20 Bom 338 (344, 345). (Principle applies to Mahomedans also.)  
('97) 21 Bom 539 (542, 543). (Minor son represented by widow.)  
(1900) 24 Bom 135 (147).  
('87) 15 Cal 70 (31) : 14 Ind App 157 : 2888 Bom Re No. 1 (P C). (Managing members of joint family.)  
('89) 12 Mad 90 (91). (Mahomedan father.)  
('73) 10 Mad 432 (439). (Case under Probate Act.)  
('24) AIR 1924 Bom 385 (388, 389). (Sale in absence of and without notice to legal representatives.)  
('03) 2 Ind Cas 818 (819) (Cal). (Case under Probate and Administration Act.)

will be bound by the doctrine of *lis pendens* and the decree can consequently be enforced against him.<sup>4</sup>

**19. Appeals.** — Orders under this Section are appealable if the conditions of Section 47 are satisfied.<sup>1</sup> See also Note 5 above, and Note 84 to Section 47.

## PROCEDURE IN EXECUTION

Powers of Court to  
enforce execution.

**51.** Subject to such conditions and limitations as may be prescribed, the Court may, on the application of the decree-holder, order execution of the decree —

- (a) by delivery of any property specifically decreed;
- (b) by attachment and sale or by sale without attachment of any property;
- (c) by arrest and detention in prison;
- (d) by appointing a receiver; or
- (e) in such other manner as the nature of the relief granted may require:

*“Provided that, where the decree is for the payment of money, execution by detention in prison shall not be ordered unless, after giving the judgment-debtor an opportunity of showing cause why he should not be committed to prison, the Court, for reasons recorded in writing, is satisfied, —*

- (a) *that the judgment-debtor, with the object or effect of obstructing or delaying the execution of the decree, —*
  - (i) *is likely to abscond or leave the local limits of the jurisdiction of the Court, or*
  - (ii) *has, after the institution of the suit in which the decree was passed, dishonestly transferred, concealed, or removed any part of his property, or committed any other act of bad faith in relation to his property; or*
- (b) *that the judgment-debtor has, or has had since the date of the decree, the means to pay the amount of the decree or some substantial part thereof and refuses or neglects or has refused or neglected to pay the same, or*

4. ('27) AIR 1927 Bom 93 (95): 51 Bom 37.

### Note 19

1. ('87) 1887 Pun Re No. 87, p. 183.

('73) 20 Suth W R 280 (282, 283).

('87) 9 All 605 (608).

('90) 12 All 313 (327).

('91) 13 All 290 (294, 295). (Costs by legal representative improperly impleaded.)

('89) 16 Cal 1 (6, 7, 8). (Questions of liability of the

property to be taken in execution in the hands of legal representative are within S. 47.)

('89) 16 Cal 603 (605, 609).

('90) 17 Cal 711 (720, 721) (F B).

('84) 7 Mad 255 (257, 258).

('87) 10 Mad 117 (120).

('03) 26 Mad 501 (501, 502).

('21) AIR 1921 Sind 29 (32): 15 Sind L R 47.

('28) AIR 1928 Rang 40 (41): 5 Rang 775.

(c) that the decree is for a sum for which the judgment-debtor was bound in a fiduciary capacity to account.

*Explanation.*—In the calculation of the means of the judgment-debtor for the purposes of clause (b), there shall be left out of account any property which, by or under any law or custom having the force of law for the time being in force, is exempt from attachment in execution of the decree.

[ See O. 21 Rr. 30 to 34, 35, 53, 56 and 64; O. 40 R. 1; also Ss. 54 and 68 to 72.]

a. Proviso inserted by the Code of Civil Procedure (Amendment) Act, 1936 (XXI of 1936), S. 2.

### Synopsis

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| <ol style="list-style-type: none"> <li>1. Scope of the Section.</li> <li>1a. "Subject to such conditions and limitations as may be prescribed."</li> <li>2. Powers of the Court in execution.</li> <li>3. "By delivery of any property specifically decreed."</li> <li>4. "By attachment and sale or by sale without attachment of any property." — Clause (b).</li> </ol> | <ol style="list-style-type: none"> <li>5. "By arrest and detention."</li> <li>5a. Proviso to the Section.</li> <li>6. "By appointing a receiver." — Clause (d).</li> <li>7. "In such other manner," etc.</li> <li>8. "On the application of the decree-holder."</li> <li>9. Appeal.</li> </ol> |
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### Other Topics

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|---|---|
| <p>Decision of questions relating to execution. See S. 47.</p> <p>Executing Court, if can go behind decree. See Note 8 to Section 38.</p> <p>Simultaneous execution. See Note 2.</p> <p>Appointment of receiver to collect future maintenance. See Note 6.</p> <p>Power to sell includes power to order temporary alienation. See Note 4.</p> <p>Power to appoint decree-holder himself as receiver. See O. 40 R. 1, Note 11.</p> | <p>Receiver in respect of inalienable property. See Note 6.</p> <p>Receiver in respect of inalienable property where there are other hypotheca which can be sold. See O. 40 R. 1, Notes.</p> <p>Power of receiver to sue in a Court outside the jurisdiction of the Court appointing him. See Note 6; see also O. 40 R. 1 Note 12.</p> <p>Adjustments or agreements of parties relating to execution. See Note 7; see also O. 21 R. 2, Notes.</p> |
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**1. Scope of the Section.** — This Section was newly inserted in the Code on the suggestion of the Advocate-General of Madras.<sup>1</sup> It enumerates in general terms the various modes<sup>2</sup> in which the Court may, in its discretion, order the execution of a decree according as the nature of the relief granted may require. In the Notes on Clauses the Select Committee observe as follows: "This clause states generally the powers of the Court in regard to execution leaving the details to be determined by rules. It will be observed that the power to direct immediate execution is no longer restricted to one class of suits but that it is now general in terms. Any limitation that may be found necessary will be imposed by rules." The Section accordingly is made to operate "subject to such conditions and limitations as may be prescribed."

**1a. "Subject to such conditions and limitations as may be prescribed."** — This Section merely enumerates the different modes of execution in general

#### Section 51 — Note 1

1. ('19) AIR 1919 Oudh 326 (327): 22 Oudh Cas 194. (Receiver to collect rents—Mortgage decrees.)
2. ('36) AIR 1936 Pesh 209 (210). (Methods provided are distinct—Application for execution in one method is distinct from application for execution in another method.)

terms while the conditions and limitations under which alone the respective modes can be availed of are prescribed further on by different provisions. As observed by Sulaiman, C. J., in *Anadilal v. Ram Sarup*,<sup>1</sup> "The Legislature has taken care to preface the Section with the words 'subject to such conditions and limitations as may be prescribed.' It is obvious that there is no wide and unrestricted jurisdiction to order execution in every case in all the ways indicated therein. The jurisdiction has to be exercised subject to such conditions and limitations as may be prescribed by the rules in the following schedule . . . Obviously, all the various modes mentioned in Section 51 are not open to an executing Court in every case; it is to be guided by the procedure laid down in the schedule, and must resort to the method appropriate to each case."

"Prescribed" under Section 2 (16) means "prescribed by rules", and "rules," under Section 2 (18) means "rules and forms" contained in the First Schedule of the Code or framed by the respective superior Courts in different Provinces under Section 122 or Section 125.

**2. Powers of the Court in execution.** — It is for the *judgment-creditor* to decide in which of the several modes mentioned in the Section he will execute his decree; and the Court has no authority except under the circumstances mentioned in the proviso, to refuse to order execution of the decree in the mode asked for on the ground that the decree-holder should, in the first instance, proceed by another mode.<sup>1</sup> On the same principle, a Court passing a decree against a defendant should not ordinarily place any limitation as to the mode in which it is to be executed.<sup>2</sup> In fact, a decree may, under the provisions of O. 21 R. 30, be executed *simultaneously* against both the person and the property of the judgment-debtor,<sup>2a</sup> though the Court has, under O. 21 R. 21, a judicial discretion to refuse to order such simultaneous execution in proper cases. The reason is that, as their Lordships of the Privy Council pointed out in the undermentioned case,<sup>3</sup> "the difficulties of a litigant in India begin when he has obtained a decree" and that far too many obstacles are placed in the way of a decree-holder who seeks to execute his decree against the property of the judgment-debtor. It is also an important principle of law that rules of procedure are only handmaids of justice and ought not to be used for obstructing justice. It is accordingly the duty of the Court executing the decree to aid the decree-holder in realising the amount due under his decree, and it should therefore offer him all possible and reasonable facilities for realising the decretal amount in as short a time as possible.<sup>4</sup> As to simultaneous executions generally, see Note 10 to Section 38 and O. 21 Rr. 21 and 30.

Ordinarily there can be only *complete* execution<sup>4a</sup> but where it is ineffectual and *invalid*, another execution, valid in law, can be ordered.<sup>4b</sup> Thus, where a delivery of possession was made after an unconditional order of stay of execution had been passed by the Appellate Court, and consequently became ineffectual, the decree-holder can, after the dismissal of the appeal by the judgment-debtor, again apply for delivery of possession.<sup>5</sup>

#### Note 1a

1. ('36) AIR 1936 AH 495 (502); 58 AH 249 (FB).

#### Note 2

1. ('36) AIR 1936 Pesh 46 (47).  
(26) AIR 1926 Lah 110 (110); 6 Lah 545. (Arrest for recovery of money.)

2. ('15) AIR 1918 Cal 186 (186).

2a. See Note 4 to O. 21 R. 30.

[See also ('35) AIR 1935 Pat 136 (131); 17 Pat 245.]

3. ('72) 17 Suth W R 459 (460) (PC).

4. ('36) AIR 1936 Cal 233 (233).

('36) AIR 1936 Pat 76 (77). (Court should not postpone or stay execution for unreasonably long time.)

4a. ('12) 16 Ind Cas 703 (703) (Cal).

('10) 8 Ind Cas 410 (411) (Oriss).

4b. ('21) AIR 1931 Pat 241 (247, 252); 19 Pat 670 (FB).

5. ('12) 16 Ind Cas 703 (710) (Cal).

3. "By delivery of any property specifically decreed." — As to the mode of execution of a decree for specific moveable property, see O. 21 R. 31 and that for specific immovable property, see O. 21 Rr. 35 and 36. As to whether, in an order for delivery of any property decreed, the Court can grant an alternative relief by way of damages in default of such delivery, see Note 7 below.

4. "By attachment and sale or by sale without attachment of any property"—Clause (b). — Where the decree itself *directs the sale* of properties, as in the case of mortgage decrees, it is clear that no attachment is necessary for bringing the properties to sale in execution of that decree.<sup>1</sup> But, is an attachment an essential pre-requisite for the validity of sale of property in execution of a *money decree*? In order to answer this question it is necessary to read this Section, which enables a Court to order a sale without attachment, along with O. 21 R. 30, which provides that a money decree may be executed by *attachment and sale* of the judgment-debtor's property, and along with O. 21 R. 64, which provides that the Court may order that any property *attached by it shall be sold*. Under the old Code which contained no provision corresponding to the present Section, there was a conflict of opinion, one class of cases holding that the object of an attachment is to bring the property under the control of the Court with a view to prevent the judgment-debtor from alienating it, and that the absence of attachment is nothing more than an irregularity and does not *ipso facto vitiate* the sale;<sup>2</sup> and another class of cases holding that an attachment is an essential preliminary to sales in execution of simple decrees for money, and that the absence of attachment makes the *sale de facto void*.<sup>3</sup>

The present Section 51 now makes it clear that a sale without attachment is not *without jurisdiction* though in view of O. 21 Rr. 30 and 64 it may amount to an *irregularity*. This is the view taken by the High Courts of Lahore,<sup>3a</sup> Patna,<sup>4</sup> Madras<sup>5</sup> and Rangoon.<sup>6</sup> The High Court of Calcutta<sup>7</sup> has, on the other hand, held, relying on certain observations of their Lordships of the Privy Council in *Raja Thakur Barmha v. Jiban Ram Marwari*,<sup>8</sup> that a sale without attachment is *ipso facto void*. The High Court of Bombay also has held in an earlier decision that a property cannot be sold without attachment.<sup>9</sup> Neither of these decisions, however, adverted to Section 51, nor, it is submitted, does the decision in *Thakur Barmha's case* support the view taken by them.<sup>9a</sup> The said decisions cannot be accepted as sound. The purpose of attachment being to prevent a judgment-debtor from placing any obstacles in the way of the Court selling the property, it cannot be that the want of it will vitiate a sale *which has actually been effected without any such obstacles*. In a recent decision

#### Note 4

1. ('29) AIR 1929 Lah 90 (91) : 10 Lah 543.

('06) 33 Cal 676 (678).

('21) AIR 1921 Pat 320 (321). (Mortgage suit — Compromise decree not expressly providing for attachment—Attachment not necessary.)

2. ('99) 21 All 311 (313).

('67) 8 Suth W R 9 (10).

('91) 18 Cal 188 (192, 193).

('94) 21 Cal 639 (641).

('11) 9 Ind Cas 918 (922) (Cal). (Case under the old Code.)

('07) 30 Mad 255 (264). (Appointment of receiver means that property is under attachment.)

('13) 18 Ind Cas 498 (499) (Mad).

('99) 21 All 140. (141, 142).

[See also ('07) 34 Cal 811 (820, 821) (FB). (Notice under S. 10, Public Demands Recovery Act,

1895 is condition precedent — Plaintiff should recover possession saying sale has not affected his title.)]

3. ('83) 5 All 86 (91) (FB).

('88) 10 All 506 (510).

('85) 7 All 702 (706, 708).

('87) 9 All 136 (138).

('92) 16 Bom 91 (101).

3a. ('30) AIR 1930 Lah 685 (685, 686).

4. ('23) AIR 1923 Pat 45 (47, 48) : 2 Pat 207.

5. ('26) AIR 1926 Mad 211 (214, 215).

6. ('24) AIR 1924 Rang 124 (126) : 1 Rang 533.

7. ('18) AIR 1918 Cal 1036 (1037).

[But see ('27) AIR 1927 Cal 847 (847).]

8. ('13) 21 Ind Cas 936 (937) : 41 Cal 590 : 41 Ind App 38 (PC).

9. ('11) 12 Ind Cas 911 (912) : 36 Bom 156.

9a. ('26) AIR 1926 Mad 211 (214, 215).

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of the Bombay High Court<sup>9b</sup> that Court also has held, dissenting from its earlier decision, that a sale in execution without an attachment is *not* a nullity.

Section 51 clause (b) empowering the Court, in general terms, to attach and sell in execution *any property* must be interpreted to mean that the Court has jurisdiction to attach and sell in execution any property which the decree-holder puts forward as the property of his judgment-debtor.<sup>10</sup> If the property does not belong to the judgment-debtor but to a stranger, the latter will not be bound by the sale in any way.<sup>11</sup> But it is not void as between the decree-holder, judgment-debtor and the auction-purchaser,<sup>12</sup> and the purchaser can only apply under O. 21 R. 91 to set aside the sale on the ground that the judgment-debtor has no saleable interest in the property sold. The property to be sold must, however, be *saleable property* under Section 60 of the Code.<sup>13</sup> Thus, lands inalienable according to the provisions of special enactments such as Section 3 of the Bengal Regulation III of 1872,<sup>14</sup> or Section 1 of the Punjab Alienation of Land Act,<sup>15</sup> cannot be sold in execution.

There is a difference of opinion on the question whether the Court can, under this clause, order a temporary alienation of property in execution, such as by mortgaging or leasing it out for a term. There is also a conflict of opinion on the question whether, where a sale is prohibited under a special or local Act, the Court can, by way of execution, grant a mortgage or a lease of the judgment-debtor's property. On the first question it has been held by the High Court of Lahore that Section 72 implies that the Court has authority to order a temporary alienation of the judgment-debtor's property. It has also held that the power to transfer the entire bundle of rights constituting ownership by way of sale includes the lesser power of transferring some of those rights.<sup>16</sup> The High Court of Allahabad has, on the other hand, dissented from the Lahore view and has held that a power to sell does not include a power to grant a lease. As regards Section 72, it has held that that Section circumscribes the Court's powers as regards the granting of leases to the conditions prescribed by it.<sup>17</sup> The Peshawar Judicial Commissioner's Court has held that the Court has power, apart from the provisions of Section 72, to order a temporary alienation of the judgment-debtor's property.<sup>17a</sup> The Nagpur High Court has held that the Court has no *inherent* power to order temporary alienation, apart from the provisions of Section 72.<sup>17b</sup>

On the second question, the High Court of Lahore holds that the prohibition of sale does not prevent the Court from mortgaging or leasing the property under this clause and that the provisions of Section 72 do not affect the powers of the Court in this respect.<sup>18</sup> According to the High Court of Allahabad, as has been seen already, the power to grant a lease arises only under Section 72 which applies only when a sale has been ordered, so that, where no sale can be ordered by reason of statutory

9b. ('39) AIR 1939 Bom 277 (278) : 41 Bom L R 463 (468, 469).

10. ('27) AIR 1927 Mad 394 (394, 395) : 50 Mad 639. (It does not mean that the Court can sell properties which before the sale all parties knew did not belong to the judgment-debtor.)

[See also ('22) AIR 1922 Lah 147 (148). (Attachment of land belonging to gaddinashin and entered in the name of the shrine — Attempt to defeat execution by getting property mutated in the name of shrine—Attachment should be ordered as requested by decree-holder.)]

11. ('26) AIR 1926 Oudh 501 (502).

12. ('27) AIR 1927 Mad 394 (394, 395) : 50 Mad 639.

13. See Note 5, Section 60.

14. ('29) AIR 1929 Pat 700 (701) : 9 Pat 368 (FB).

15. ('20) AIR 1920 Lah 456 (459) : 1 Lah 192 (FB).

16. ('30) AIR 1930 Lah 77 (78).

('29) AIR 1929 Lah 195 (195).

('20) AIR 1920 Lah 456 (459) : 1 Lah 192 (FB).

('36) AIR 1936 Lah 696 (698).

17. ('38) AIR 1938 All 290 (291, 292) : 1 L R (1938) All 528 (FB). (AIR 1932 All 571 overruled. [See also ('37) AIR 1937 All 699 (700, 701).])

17a. ('36) AIR 1936 Pesh 90 (91).

('35) AIR 1935 Pesh 113 (114).

17b. ('37) AIR 1937 Nag 41 (42).

18. ('20) AIR 1920 Lah 456 (459) : 1 Lah 192 (FB).

[See also ('36) AIR 1936 Lah 30 (31).]



prohibition, the Court has no power to grant a lease at all.<sup>19</sup>

According to the Judicial Commissioner's Court of Peshawar, when a sale is prohibited, all powers, such as those of mortgaging or leasing the property which are derived from the power to sell are also taken away.<sup>20</sup>

The Nagpur High Court has held that the Court cannot order the attachment of property for the purpose of temporary alienation when such property is not liable to be sold in execution.<sup>20a</sup>

Where not only a sale but also a temporary alienation is prohibited, it is of course clear that the Court cannot, by way of execution, make an order for temporary alienation.<sup>21</sup>

The word "sale" in the Section includes not only a sale in court auction but also a sale by a nominee of the parties under a consent decree.<sup>22</sup>

The fact that immovable property is attached before judgment and the attachment is continued after the decree will not disable the decree-holder from applying for the attachment and sale of the moveable property of the judgment-debtor.<sup>23</sup>

**5. "By arrest and detention."** — Under O. 21 R. 30 a decree for the payment of money, including a decree for the payment of money as an alternative to some other relief, may be executed by the detention in the civil prison of the judgment-debtor. Under O. 21 R. 31 (1) a decree for specific *moveable* property may be similarly executed by the arrest and detention of the judgment-debtor. But there are some exceptions to this rule. Thus, a decree cannot be executed by arrest and detention where the judgment-debtor is a woman (Section 56) or a minor or legal representative of a deceased person (Sections 50 and 52).<sup>1</sup>

As has been seen in Note 2 above, it is for the judgment-creditor to decide in which of the several modes he will execute his decree. Where, therefore, a decree-holder prays for the arrest of the judgment-debtor the Court cannot (except as provided for by the proviso) compel the decree-holder to proceed against his property<sup>1a</sup> or to accept payment by instalments.<sup>2</sup>

See also Sections 55 to 59 and O. 21 Rr. 30, 31 (1) and 37 to 40 *infra* which contain further provisions on this mode of execution.

**5a. Proviso to the Section.** — The proviso to the Section was inserted in the Code by the Code of Civil Procedure Amendment Act of 1936 (21 of 1936), Section 2. The proviso restricts the power of the Court to arrest the judgment-debtor in execution of a money decree and lays down that except in certain specified cases, the judgment-debtor shall not be arrested in execution of such a decree. See the under-mentioned cases<sup>1</sup> decided with reference to the proviso.

19. ('38) AIR 1938 All 290 (291, 292) : I L R (1938) All 528 (FB).

('37) AIR 1937 All 699 (700, 701).

20. ('36) AIR 1936 Pesh 90 (90, 91).

[But see ('35) AIR 1935 Pesh 113 (114).]

20a. ('37) AIR 1937 Nag 41 (43).

21. ('29) AIR 1929 Pat 700 (701); 9 Pat 368 (FB).

22. ('17) AIR 1917 Cal 740 (742); 44 Cal 789.

23. ('36) AIR 1936 Bom 268 (272).

#### Note 5

1. ('22) AIR 1922 Nag 98 (100, 101); 18 Nag LR 145 (Judgment-debtor a woman.)

1a. ('39) 180 Ind Cas 767 (769) (Pat).

('37) AIR 1937 Oudh 379 (381) : 13 Luck 340.

('36) AIR 1936 Pesh 46 (47).

('35) AIR 1935 Cal 127 (129).

2. ('30) AIR 1930 Lah 220 (221).

#### Note 5a

1. ('39) 43 Cal W N 427 (429) (In the calculation of the means of the judgment-debtor for the purpose of S. 51 proviso, cl. (b), C. P. Code, the necessary expenses of maintaining the life of the debtor and of his dependants must be taken into account and deducted from his income.)

('39) AIR 1939 Lah 299 (299, 300). (Judgment-debtor being agriculturist, Court while determining question of his capacity to pay decretal amount cannot take into account his agricultural lands and residential houses.)

**6. "By appointing a receiver"—Clause (d).**—Execution by appointment of a receiver is known as *equitable execution*<sup>1</sup> and is entirely within the *discretion* of the Court.<sup>2</sup> It is thus an exception to the general rule stated in Note 2 above that it is for the *decree-holder* to choose the mode of execution and that the Court has no power to refuse to order execution in the mode asked for. This mode of execution was being adopted by Courts even under the old Code,<sup>3</sup> and this Section only gives legislative sanction to the exercise of such powers. The Section, however, does not confer a general power on the executing Court to appoint a receiver in every case. It merely prescribes a mode of execution of the decree by appointment of a receiver while the conditions and limitations under which such appointment is to be made are prescribed by O. 40 R. 1.<sup>3a</sup>

There is a difference of opinion as to whether a receiver may be appointed in respect of properties *which cannot be attached and sold*. According to the High Courts of Allahabad,<sup>3b</sup> Calcutta,<sup>4</sup> and Lahore<sup>4a</sup> and the Judicial Commissioners' Courts of Nagpur,<sup>5</sup> and Peshawar,<sup>5a</sup> such an appointment can be made, the Nagpur Court taking the view that the appointment of a receiver does not amount to attachment. The High Court of Patna has, on the other hand, held that such an appointment amounts to an *equitable attachment* and that therefore no such appointment can be made in respect of properties not liable to be attached and sold under Section 60.<sup>6</sup> The Allahabad High Court has held in a recent decision that where the law prohibits the *dispossession* of the judgment-debtor from certain property, a receiver cannot be appointed in respect of such property.<sup>6a</sup> No receiver can be appointed in respect of a *mere right to future*

('39) AIR 1939 Pat 22 (22). (The onus of proof is on the decree-holder to establish that the judgment-debtor had sufficient means to pay the debt within the meaning of sub-cl. (b) of the proviso.)

('38) AIR 1938 Cal 448 (449). (Fraudulent concealment or transfer of property—What amounts to, within the meaning of the proviso.)

('38) AIR 1938 Lah 692 (693). (Arrest is not possible unless there has been some contumacious conduct on the part of the judgment-debtor and mere inability to pay does not justify arrest.)

('38) AIR 1938 Pesh 17 (18). (Judgment-debtor after decree selling his property but neglecting to pay decretal amount is liable to be detained in civil prison.)

#### Note 6

1. ('39) AIR 1939 Oudh 116 (118).

('29) AIR 1929 Pat 700 (701) : 9 Pat 368 (FB). (Equitable execution is equitable attachment.)

('33) AIR 1933 All 227 (228). (Application by defendants.)

('30) AIR 1930 Mad 4 (9,10). (Receiver is an officer of the Court—Second defendant appointed.)

('32) AIR 1932 Cal 189 (192) : 59 Cal 205. (Such appointment to be deemed as one under O. 40 R.1.)

('30) AIR 1930 Cal 159 (159). (Affirmed in AIR 1931 P C 160.)

[See also ('24) AIR 1924 Nag 165 (166). (Appointment of a receiver is a mode of execution.)]

2. ('39) AIR 1939 Oudh 116 (118).

('36) AIR 1936 Bom 399 (400).

('13) 21 Ind Cas 283 (286, 287); 16 Oudh Cas 238. (Property unsaleable for rent and profits.)

('32) AIR 1932 Cal 189 (192); 59 Cal 205. (Decree-holder cannot ask for appointment as a right.)

('31) AIR 1931 Oudh 307 (308) : 7 Luck 203.

('32) AIR 1932 Mad 193 (195). (Third party in possession—Parties without present right cannot disturb him—Appointment when just and convenient.)

[See also ('33) AIR 1933 Sind 231 (232). (Defendant and property not under Court's jurisdiction and not a subject of suit or execution—Appointment refused.)]

3. ('87) 11 Bom 448 (455). (Under S. 503 of C. P. Code of 1882 to collect attached debt.)

3a. ('37) AIR 1937 All 389 (392, 393) : I L R (1937) All 542.

('37) AIR 1937 Lah 738 (739).

('37) AIR 1937 Oudh 232 (233).

3b. ('34) AIR 1934 All 605 (606). (Money decree against agriculturists in Bundelkhand.)

4. ('12) 14 Ind Cas 227 (228) : 39 Cal 1010. (Income of Ghatwali property is not itself Ghatwali property and is liable to be sold.)

('30) AIR 1930 Cal 159 (160). (Affirmed on appeal in AIR 1931 P C 1e0.)

4a. ('38) AIR 1938 Lah 458 (458).

5. ('15) AIR 1915 Nag 98 (99); 11 Nag L R 113. (Money decree in lieu of maintenance—Sir land.)

('33) AIR 1933 Nag 266 (267). (AIR 1925 P C 176, Foll.—Inam Jahagir—For share in the Jahagir property profits.)

5a. ('38) AIR 1938 Pesh 30 (31).

6. ('29) AIR 1929 Pat 700 (700, 701); 9 Pat 368 (FB). (Agricultural lands in Sonthal Parganas.)

6a. ('37) AIR 1937 All 389 (392, 393). (Land not transferable under Agra Tenancy Act.)

*maintenance* inasmuch as such a right is not *property* at all.<sup>7</sup> But where the maintenance is *charged on property* or is to *come out of specified properties*, it has been held by the Privy Council that a receiver may be appointed for realising the rents and profits of the properties and for applying them towards the maintenance of the debtor and the balance towards the discharge of the decree debt.<sup>8</sup>

A receiver may be appointed to realise a decree or debt which has been attached in execution proceedings,<sup>9</sup> or to collect the future rents and profits accruing due from attached properties,<sup>10</sup> or from the estate of a deceased debtor in the hands of his heirs,<sup>11</sup> or even in respect of property situate outside the Court's jurisdiction,<sup>11a</sup> or for realisation of property by prosecuting causes of action arising outside jurisdiction.<sup>12</sup>

Where a receiver has been appointed at the instance of one decree-holder, it is not necessary that every decree-holder should also have a receiver appointed in his own suit in respect of the same property,<sup>13</sup> though it does not disable him from asking for such relief in proper cases. Thus, a mortgagee decree-holder can ask for the appointment of a receiver though a receiver has already been appointed in a partition suit.<sup>14</sup>

**7. "In such other manner," etc.** — As to the other modes of execution than those specified in clauses (a) to (d), see the following —

*Section 54.* — Partition of estate or separation of share of such estate to be made by the Collector or any gazetted subordinate of the Collector.

*Sections 68 to 72.* — Execution of decrees against immovable property in certain cases to be transferred to the Collector.

*O. 21 R. 31 (2).* — Award of compensation to decree-holder for disobedience of decree to deliver specific moveable property.

*O. 21 R. 32.* — Enforcement of decree for specific performance, for restitution of conjugal rights or for an injunction.

*O. 21 R. 33.* — Special procedure for execution of a decree for restitution of conjugal rights.

7. (1893) 1 Q B 551 (558), *Holmes v. Millage*. (Moneys to become payable in consideration of services.)

[See also ('36) AIR 1936 Bom 399 (400). (Receiver cannot be appointed in respect of possible future earnings.)

('33) AIR 1933 Bom 350 (352); 57 Bom 507.]

8. ('25) AIR 1925 P C 176 (176); 47 All 385; 52 Ind App 262 (PC).

('15) AIR 1915 Nag 98 (99); 11 Nag L R 113. (Rents and profits in lieu of maintenance decree to be recovered from *sir lands*.)

('26) AIR 1926 Mad 565 (565); 49 Mad 567. (Recovery of stamp duty from pauper's future maintenance.)

('31) AIR 1931 P C 160 (161); 51 Ind App 215; 59 Cal 1 (PC). (Pension implies periodical payment of money by Government.)

[See also ('35) AIR 1935 Mad 1046 (1047). (Court can direct money collected by receiver in execution to be disbursed for benefit of judgment-debtor.)

('36) AIR 1936 Nag 288 (289); I L R (1937) Nag 534. (Service inam lands—Execution against judgment-debtor — Court can appoint receiver to collect income.)

('33) AIR 1933 Nag 266 (267). (Berar Inam Rules, R. 3—Jahagir granted under, for maintenance—Receiver can be appointed to manage jahagir—Suitable allowance to be fixed on amount coming into receiver's hands.)]

9. ('87) 11 Bom 448 (455).

('29) AIR 1929 Bom 279 (280). (Where a decree to be realised has been mortgaged to the plaintiff in the mortgage suit in which receiver is appointed.)

10. ('25) AIR 1925 Rang 318 (319, 320); 3 Rang 235. (Order allowing decree-holder to collect rent set aside—Receiver only can file suit for rent.)

11. ('19) AIR 1919 Oudh 326 (328); 22 Oudh L R 194. (Money decree.)

11a. ('38) AIR 1938 Lah 93 (94); I L R (1938) Lah 305. (Receiver can be appointed in respect of property in native State—But the receiver cannot be directed to take possession of such property—Proper order is to direct the plaintiff in possession to hand over possession to the receiver.)

('30) AIR 1930 Cal 502 (503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000).

12. ('21) AIR 1921 Mad 222 (223).

13. ('30) AIR 1930 Mad 441 (442).

14. ('11) 12 Ind Cas 265 (1911).

*O. 21 R. 34.* — Execution of decree for execution of a document or endorsement of a negotiable instrument.

*O. 21 R. 53.* — Attachment of decrees.

*O. 21 R. 56.* — Delivery of attached coins or currency notes to the party entitled under the decree.

This clause does not enable a Court to add to, or subtract from, the terms of the decree itself inasmuch as it is a general principle of law that an executing Court cannot go behind the decree but must execute it as it stands.<sup>1</sup> Thus, where a decree in a redemption suit directs delivery of title deeds without any alternative provision for payment of damages in default of doing so, the *executing Court* cannot award such damages, though a separate *suit* may lie therefor.<sup>2</sup>

As to adjustments or agreements of parties out of Court as to the mode of execution of the decree, see *O. 21 R. 2*.

**8. "On the application of the decree-holder."** — The Section requires that the Court can act only on the *application of the decree-holder*. The reason for this requirement is that it concerns the parties alone and that the Courts need execute their decrees only if the parties entitled thereto want it.<sup>1</sup> But the application need not necessarily be in writing; it may be *oral*.<sup>2</sup> Nor need the mode of execution be *specifically expressed* in such application; it may be inferred from the act of the Court executing the decree.<sup>3</sup> As regards the appointment of a receiver, it has been held by the High Court of Rangoon that even without an application, the Court can *suo motu* order the appointment of a receiver under Section 94 (d) and *O. 40 R. 1*.<sup>4</sup> This view is correct. The requirement as to the application in this Section is subject to the conditions and limitations prescribed by the rules—in this case *O. 40 R. 1*—under which the Court can act *suo motu*.

This Section requires that the application must be made by the decree-holder. A *stranger* to the suit or decree cannot apply for execution though there may be a benefit conferred on him by the decree.<sup>5</sup> Nor can the judgment-debtor apply under this Section, *e. g.*, for the appointment of a receiver.<sup>6</sup>

For definition of "decree-holder," *vide* Section 2 clause (3).

**9. Appeal.** — This Section must be read with *O. 40 R. 1*, and an order appointing a receiver in execution, if it falls under *O. 40 R. 1*, is appealable as an order under *O. 43 R. 1 (s)*.<sup>1</sup> But if the order of appointment is only a *conditional* one on the furnishing of security and security is not furnished, the order does not take effect at all and no appeal lies.<sup>2</sup> An order refusing to discharge a receiver is one relating to the

#### Note 7

1. See Note 8 under Section 38, *ante*.

2. ('22) AIR 1922 Mad 299 (300).

#### Note 8

1. ('20) AIR 1920 Lah 443 (446). (Court cannot appoint receiver unless asked.)

2. See *O. 21 R. 11 Cl. (2)*.

3. ('20) AIR 1920 Lah 443 (446).

4. ('25) AIR 1925 Rang 318 (320) : 3 Rang 235. (To collect rent in a money decree.)

5. ('17) AIR 1917 Oudh 182 (184, 185). (Compromise decree for allowances—Third person, though allowances fixed for him, not entitled to apply for execution.)

[See however ('32) AIR 1932 Mad 193 (194, 195). (Scheme suit—Board of control created

to call for accounts—Misappropriation and disobedience by trustee—Board of control deemed decree-holder entitled to ask for appointment of receiver.)]

6. ('22) AIR 1922 Pat 369 (371). (Right of decree-holder to sell mortgaged property cannot be defeated.)

[See however ('70) 13 Suth W R 453 (454). (Manager appointed under S. 243 of Act VIII of 1859.)]

#### Note 9

1. ('27) AIR 1927 Lah 190 (190).

('11) 12 Ind Cas 745 (751) (Cal).

('12) 14 Ind Cas 227 (228): 39 Cal 1010.

('20) AIR 1920 Lah 443 (444).

2. ('11) 12 Ind Cas 745 (751) (Cal).

"execution" of the decree within Section 47 and as such is appealable as a *decree*.<sup>3</sup> An order under this Section which does not fall within Section 47 or within O. 43 R. 1 is not appealable.<sup>4</sup>

**52.** [S. 252.] (1) Where a decree is passed<sup>4</sup> against a party<sup>5</sup> as the legal representative<sup>3</sup> of a deceased person, and the decree is for the payment of money<sup>12</sup> out of the property of the deceased,<sup>9</sup> it may be executed by the attachment and sale<sup>14</sup> of any such property.

(2) Where no such property remains in the possession of the judgment-debtor and he fails to satisfy the Court that he has duly applied such property of the deceased as is proved to have come into his possession, the decree may be executed against the judgment-debtor to the extent<sup>13</sup> of the property in respect of which he has failed so to satisfy the Court in the same manner as if the decree had been against him personally.

[1877, Ss. 252 and 234; 1859, Ss. 203 and 210. See O. 22, Rr. 4, 5 and 12.]

### Synopsis

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|--|---|
| 1. Legislative changes.  | 9. "Out of the property of the deceased."   |
| 2. Scope and object of the Section.  | 10. Property in the hands of a third party.   |
| 3. "Legal representative."   | 11. Insolvency of heirs after decree—Effect.  |
| 4. Decree against legal representative, when and how to be passed and its effect.  | 12. Decree for payment of money.  |
| 5. Decree against some of several legal representatives—Validity and legal effect. | 13. Liability of legal representative under the Section.  |
| 6. Decree against wrong legal representative—Effect.                               | 14. Manner of execution.  |
| 7. Decree against executor who has not proved the will—Effect.                     | 15. Right of legal representative to question the validity of the decree. See Section 50, Note 7. |
| 8. Decree against dead person—Effect.  | 16. Appeal.   |

### Other Topics (Miscellaneous)

"Attachment and sale," meaning of. See Note 14 Pt. (3).

Burden of proof. See Note 13 Pts. (2) and (3).

Due application, what is. See Note 13 Pts. (6) and (7).

Liability of legal representatives of a Hindu or Mahomedan.

See Note 5 F-N (1); see also Section 11 Note 63b.

Personal liability of legal representative. See Note 13 Pt. (4).

"Where no such property remains." See Note 13 Pt. (5).

**1. Legislative changes.** — The words "in respect of which he has failed so to satisfy the Court" have been substituted for the words "not duly applied by him" in clause (2) of the Section.

**2. Scope and object of the Section.** — This Section contemplates cases where the debtor dies before the decree and the decree itself has been passed against the

3. ('18) AIR 1918 Pat 60 (61).

4. ('29) AIR 1929 Rang 161 (161); 7 Rang-110.

when the suit is based on the allegation that the defendants are in possession of the assets.<sup>5</sup>

In an early decision of the Calcutta High Court, it was held that where there are several legal representatives of the deceased it is not necessary that their shares should be defined; it is enough if a joint decree is passed against all of them.<sup>6</sup> But it has been recently held by the Privy Council that in a suit against the heirs of a deceased Mahomedan for a dower debt due by the deceased, the proper form of decree is against each of the heirs of the deceased for that proportion of the plaintiff's joint claim which corresponds to the share of each heir in the estate of the deceased.<sup>6a</sup> The decree against a legal representative under this Section should direct the defendant to pay the decree debt *out of the assets* of the deceased in his hands.<sup>7</sup> A decree which does not make such a direction is an erroneous decree.<sup>8</sup>

The decree passed under this Section is a mere money decree and does not create a *charge* on the assets of the deceased. The Section only states the extent to which and the manner in which the debt can be recovered, and in no way provides for reservation of property to satisfy the debt.<sup>9</sup> Where a person is sued as a representative, a decree cannot be passed against him on the ground that he is a partner since it would alter the nature of the suit.<sup>10</sup>

In order that the provisions of this Section may apply, the decree must be against a *person* and not merely against something which is not a person. Thus, a decree merely against the assets of a deceased person without mentioning the name of the legal representative is inexecutable.<sup>11</sup>

Where a decree is passed against several heirs of a deceased person and the decree-holder realises the entire decretal amount from some of the heirs alone, the latter can sue the other heirs for contribution.<sup>12</sup>

**5. Decree against some of several legal representatives — Validity and legal effect.** — As has been already mentioned in Note 63b to Section 11, a decree obtained against some only of several heirs of a deceased person is binding on the estate<sup>1</sup> in the absence of fraud or collusion, on the principle of substantial

(72) 18 Suth W R 185 (188) (PC).

(73) 20 Suth W R 280 (282, 283).

(27) AIR 1927 All 459 (460); 49 All 645. (Per Mukerji, J.)

(73) 20 Suth W R 162 (162).

(78) 2 Cal L Rep 189 (191, 192).

(81) 1881 Pun Re No. 11, page 20.

(75) 1875 Pun Re No. 12, page 19.

(31) AIR 1931 Nag 173 (175); 27 Nag L R 247. (120 Ind Cas 333 (Nag) Foll.)

[But see (25) AIR 1925 Nag 380 (381). (Possession of assets may be enquired into either in suit or execution proceedings.)

(27) AIR 1927 All 459 (462); 49 All 645. (Per Ashworth J.)]

5. (70) 14 Suth W R 431 (432). (If possession not proved, suit must be dismissed.)

6. (71) 15 Suth W R 192 (192, 193).

6a. (38) AIR 1938 P C 80 (84); 65 Ind App 119; 32 Sind L R 362 (PC).

7. (08) 18 Mad L Jour 36 (36).

(96) 1896 Bom P J 226 (227).

(1863) Marsh 611.

(10) 6 Ind Cas 397 (397) (Mad).

(17) AIR 1917 Mad 418 (419).

(26) AIR 1926 Oudh 301 (303).

(31) AIR 1931 Sind 141 (143); 25 Sind L R 173.

(70) 2 N W P H C R 449 (450). (Costs also.)

8. (23) AIR 1923 Bom 414 (415). (Such decree can be amended even at a late stage.)

(74) 1874 Pun Re No. 65, page 213.

9. (16) AIR 1916 Mad 645 (645, 646). (Case under Provincial Insolvency Act (3 of 1910), S. 16(2).)

(83) 9 Cal 406 (409).

10. (09) 2 Ind Cas 146 (148); 34 Bom 244.

11. (34) AIR 1934 Mad 562 (563). (Phrase "out of the estate of the deceased" is merely restrictive—In this case it was held that amendment of the decree was the remedy.)

12. (38) AIR 1938 P C 169 (173, 174); 65 Ind App 219; 13 Luck 494 (PC).

#### Note 5

1. (05) 32 Cal 296 (313); 32 Ind App 23 (PC). (Mahomedan heirs.)

(82) 8 Cal 370 (373, 374). (Do.)

(83) 9 Cal 508 (510). (Do.)

(90) 14 Bom 597 (602, 603, 604). (Do.)

(79) 5 Cal L Rep 477 (480); 6 Ind App 233 (PC). (Do.)

representation.<sup>1a</sup> This principle will not, however, apply where all the heirs are impleaded and some of them are subsequently exempted by the plaintiffs from the array of defendants. In such a case the defendant exempted cannot be considered to have been represented by the other defendants.<sup>1b</sup> (See also Section 50 Note 14.) In the case of *co-administrators* or two or more *legatees*, it has been held that a decree against one only will not bind the estate.<sup>2</sup>

**6. Decree against wrong legal representative — Effect.** — Where a creditor selects from among several rival claimants to the estate of his deceased debtor any one whom he *bona fide* believes to have the best *prima facie* title as legal representative and obtains a decree against him, the decree and the consequent execution sale will bind the true heir in the absence of fraud or collusion.<sup>1</sup> This is an exception to the general principle of law that a decree will bind only the parties to it or those claiming through them. But the true legal representative cannot, after the decree, be brought on record *for the purpose of execution* and the deceased debtor's property *in his hands* cannot be attached and sold in that same suit.<sup>2</sup> If a person who has no sort of right to represent the deceased is made a party to the suit and a decree is obtained against him as representing the deceased, such decree cannot bind the true heir.<sup>3</sup> In such a case it cannot be said that the suit was a *bona fide* one.

('86) 11 Bom 361 (364, 365). (Do.)

[See ('89) 12 Mad 356 (365). (Some persons allowed to represent a community — Decree for injunction — No personal liability against persons not co-nominees on the record.)]

*In view of the Privy Council decision above referred to, the following cases relating to Mahomedan co-heirs cannot be considered to be good law:—*

('79) 4 Cal 142 (153, 155, 156).

('76) 2 Cal 395 (398).

('85) 7 All 822 (826, 845) (F B).

('70) 14 Suth W R 448 (449).

('01) 23 All 263 (264).

('95) 19 Bom 273 (275).

('75) 1 All 57 (59, 60) (F B).

('85) 7 All 716 (719).

('87) 14 Cal 464 (483).

('82) 11 Cal L Rep 268 (271, 272).

('23) AIR 1923 Bom 411 (411, 412): 47 Bom 712.

1a. ('03) 26 Mad 230 (234). (Mahomedan heirs.)

('28) AIR 1928 Mad 1199 (1199). (Do.)

('24) AIR 1924 Bom 420 (421). (Do.)

('87) 12 Bom 101 (103). (Do.)

('95) 20 Bom 338 (345). (Do.)

('89) 12 Mad 90 (91, 92). (Do.)

('94) 21 Cal 311 (317). (Do.)

('92) 20 Cal 453 (463). (Hindu heirs.)

('25) AIR 1925 All 479 (480): 47 All 466 (Do.)

1b. ('32) AIR 1932 All 591 (592, 593): 54 All 796.

[See also ('38) AIR 1938 P C 7 (8): 13 Luck 61: 32 Sind L R 221 (P C). (Suit against sons and grandsons of deceased Hindu — Suit dismissed against grandsons, decreed against sons — Decree cannot be executed against shares of grandsons in property.)]

2. ('17) AIR 1917 Pat 432 (432). (Co-administrators.)

('13) 18 Ind Cas 632 (632, 633) (Mad). (Decree against one only of two legatees.)

#### Note 6

1. ('33) AIR 1933 Lah 380 (381): 14 Lah 696.

('16) AIR 1916 Mad 1022 (1023, 1024).

('30) AIR 1930 Mad 930 (938): 54 Mad 212.

(Binding on legatee also.)

('28) AIR 1928 Mad 243 (243, 245).

(1900) 24 Bom 135 (147, 148).

('72) 17 Suth W R 459 (461) (P C).

(1864) Marsh 614.

('85) 11 Cal 45 (49, 50, 51, 52). (Adopted son also is bound unless he shows some good cause.)

('89) 16 Cal 40 (56, 60, 61): 15 Ind App 195 (PC).

('79) 4 Cal 342 (344, 345, 346).

(1863) 1863 Suth W R Sup 119. (Campbell, J. Dissentient.)

('96) 23 Cal 374 (388, 389).

[See ('39) AIR 1939 Lah 277 (279): 41 Pun L R 147 (149). (Decree against widow as legal representative of deceased husband — Minor son not impleaded in suit is bound by decree.)]

[But see ('13) 18 Ind Cas 381 (382) (Bom). (Submitted wrongly decided.)]

2. ('09) 3 Ind Cas 737 (738): 33 Mad 75.

('32) AIR 1932 Lah 314 (315). (True representative cannot be substituted after period of limitation. See S. 22, Limitation Act.)

('27) AIR 1927 Mad 197 (198, 199).

('16) AIR 1916 Cal 661 (662). (Remedy of decree-holder is either to have decree vacated and proceed with true legal representative or to file a suit on the judgment against the true legal representative.)

('87) 14 Cal 316 (320).

('14) AIR 1914 Cal 28 (29).

3. ('80) 5 Bom 14 (19).

('34) AIR 1934 All 474 (477, 479). (Trespasser in possession — Decree against — Not binding on real heir.)

('33) AIR 1933 Mad 43 (46, 48). (Even in the absence of fraud.)

('69) 12 Suth W R F B 1 (4) (F B).

As regards the cases where the true heir is affected by estoppel the principle stated in Section 50 Note 14 applies here also. See also the undermentioned cases.<sup>4</sup>

**7. Decree against executor who has not proved the will — Effect.** — An executor appointed by will does not represent the deceased by virtue of the will until he has obtained probate. Therefore, a suit against him by the creditor is not maintainable unless the executor has intermeddled with the estate.<sup>1</sup> In order that the just claims of the creditor in such cases may not be defeated by the executor not taking out probate, the persons who take possession of the estate of the deceased will be treated as the representatives of the deceased. Even if the decree obtained against them cannot be executed against the estate in the hands of the executor when he has taken out probate, it is sufficient to enable the plaintiff to bring a suit against the executor in order to have the decree satisfied.<sup>2</sup>

**8. Decree against dead person—Effect.** — A suit against a dead person is not maintainable.<sup>1</sup> If a decree is obtained against a dead person without impleading the legal representative, the decree is a nullity and cannot be executed.<sup>2</sup> But the decree is not invalid if the defendant dies *after the conclusion* of the hearing but *before the pronouncing of the judgment*.<sup>3</sup> See O. 22 R. 6. So also a decree passed by the Privy Council against a respondent who dies pending the appeal is not a nullity.<sup>4</sup>

**9. "Out of the property of the deceased."** — A decree obtained against the legal representative of a deceased debtor can be executed only against the estate of the

('68) 14 Suth W R 448n (449n).

('82) 4 All 192 (194, 195). (Proper heir who obtained from District Court letters of administration under Indian Succession Act, is not affected by the decree against wrong heirs.)

('71) 8 Bom H C R A C 37 (39).

('85) 9 Bom 86 (91, 93).

('74) 8 Mad H C R 186 (188).

('11) 12 Ind Cas 915 (918, 919) : 34 All 79. (The succeeding person to estate as per Hindu law does not do so as a heir or legal representative but as survivor; hence cannot be said heir to his assets.)

('10) 5 Ind Cas 710 (711) (Cal) (Hindu widow—Decree against, after remarriage, does not bind the true legal representative of deceased husband.)

('14) AIR 1914 Cal 263 (267). (When defendant dies, plaintiff must choose under S. 368 against whom he is to proceed.)

('88) 11 Mad 408 (410, 411). (Submitted decision is correct though the reasoning is wrong.)

4. ('27) AIR 1927 Bom 181 (184) : 51 Bom 125. (On alleged representative's request his name as representative removed. He or persons claiming under him are estopped from further claiming.)

('71) 8 Bom H C R A C 37 (43). (Case of intermeddling.)

('85) 9 Bom 86 (91).

('16) AIR 1916 All 284 (285). (Once the plaintiff confines himself to decree for assets in hand, he cannot in execution claim the property which came in the hands of defendant thereafter.)

('79) 3 Cal L Rep 157 (157, 158).

('25) AIR 1925 Nag 380 (381). (Defendant's failure to deny oral pleading — Inference of admission cannot be drawn.)

#### Note 7

1. (1894) 1894 A C 497 (442), Mohamadu Mohideen Hadjiar v. Pitchay.

('12) 16 Ind Cas 690 (691) (Cal).

('94) 19 Bom 821 (827).

('09) 2 Ind Cas 818 (819) (Cal). (Order for probate not sufficient.)

2. ('03) 80 Cal 1044 (1057, 1058, 1059).

('79) 4 Cal 342 (345, 346).

('15) AIR 1915 Cal 207 (208).

('91) 14 Mad 454 (457). (4 Cal 342 followed.)

('08) 35 Cal 276 (279, 280). (Administrator—Executor de son tort.)

#### Note 8

1. ('08) 31 Mad 86 (88, 89).

('25) AIR 1925 Mad 1210 (1210) : 49 Mad 18 (F B). (But in the case of an appeal the defect can be rectified. Overruling AIR 1924 Mad 56.)

2. ('16) AIR 1916 Mad 656 (656) : 38 Mad 682.

('95) 17 All 478 (481, 482).

('79) 3 Cal L Rep 192 (193).

('13) 20 Ind Cas 506 (506) (Cal).

('68) 10 Suth W R 455 (456, 457).

('67) 7 Suth W R 52 (52).

('67) 1867 Pun Re No. 65.

('70) 1870 Pun Re No. 85.

('02) 4 Bom L Rep 340 (341).

('20) AIR 1920 Nag 61 (61, 62) : 16 Nag L R 138.

('70) 14 Suth W R 337 (338). (Principle applies to appellate decrees also.)

('02) 26 Bom 317 (319). (Do.)

3. ('95) 19 Bom 807 (809). (17 Bom 29 followed.)

('99) 21 All 314 (315, 316). (19 Cal 513 (PC) followed.)

('92) 19 Cal 513 (538) : 19 Ind App 108 (P O).

('03) 26 Mad 101 (102).

('97) 21 Bom 314 (317).

4. ('37) AIR 1937 Pat 321 (322) : 16 Pat 316.



latter in his hands.<sup>1</sup> The decree-holder is not entitled to proceed against his separate property.<sup>2</sup> As to cases of survivorship in Hindu joint families, see Section 53 Note 2. Where the survivor does not inherit as heir of the deceased but gets into the estate in his own *individual right*,<sup>2a</sup> or where lands are attached to a hereditary office and are inalienable, they have not the character of simple heritable property and do not form part of the assets of the deceased person.<sup>3</sup> But, where under a grant for maintenance, a grantee has a heritable but non-transferable interest in the property, it cannot be said that each successive heir has only a life-interest in the property. As the grant is heritable each heir derives his interest by inheritance and the property in his hands forms the assets of the deceased grantee.<sup>3a</sup>

Rents and profits of immovable property are legal incidents of such property and bear the same character as the property itself. So, where a decree is passed against

### Note 9

1. ('08) 18 Mad L Jour 36 (36, 37).
- ('27) AIR 1927 Bom 52 (52, 53). (Order 21 Rule 12 is not applicable in such cases.)
- ('31) AIR 1931 Bom 229 (231, 232). (Hindu law—Son is liable for his father's lawful debts only.)
- ('68) 10 Suth W R 199 (200).
- ('96) 1896 Bom P J 226.
- ('75) 23 Suth W R 265 (266).
- ('78) 2 Cal L Rep 189 (192).
- ('74) 22 Suth W R 388 (388). (The heirs of the deceased are also liable for the papers in custody for which the claim is established against the estate of the deceased.)
- ('74) 22 Suth W R 494 (495). (The heirs are also liable for damages arising out of breaches of contract made by the deceased.)
- ('84) 8 Bom 220 (223). (Although the property may not have come into the sons' possession.)
- (1865) 2 Suth W R 258 (258).
- ('74) 1874 Pun Re No. 65, p. 213.
- ('05) 1905 Pun LR No. 48, p. 185. (A got a decree for possession of lands against X but died before getting possession—X himself, legal representative of A and hence merger of titles—Held lands liable in the hands of X for decree against A.)
- ('29) AIR 1929 Lah 424 (425).
- ('24) AIR 1924 Nag 410 (411) : 21 Nag L R 12. (Son's sons are liable after their separation from grandfather for his debts to the extent of assets.)
- ('87) 11 Bom 528 (532, 533). (Widow's arrears of maintenance are her assets for the cause of debt incurred by her.)
- ('25) AIR 1925 Nag 380 (381). (Can be executed against property obtained even after the decree.)
- ('16) AIR 1916 All 284 (286). (Do.)
2. ('17) AIR 1917 Pat 536 (537).
- ('25) AIR 1925 Oudh 113 (113) : 27 Oudh Cas 234. (Even though passed as a personal decree not executable.)
- ('21) 65 Ind Cas 224 (224) (Pat). (Do.)
- ('76) 25 Suth W R 224 (224). (Judgment-debtor must prove and file the whole inventory of the whole estate descended to him before he can claim exemption on ground that he only received a small asset.)
- ('78) 3 Mad 42 (46).
- ('69) 12 Suth W R 233 (233, 234).

- ('70) 14 Suth W R 362 (362). (Before executing the decree against the heirs personally for the deceased person's assets decree-holder must prove that they have not duly applied the same and that no such property of the deceased can be found as he can sell in execution.)
- ('72) 18 Suth W R 185 (188) (P C).
- ('73) 20 Suth W R 280 (282, 283).
- ('06) 1906 Pun Re No. 123, p. 466.
- (1864) 1864 Suth W R Misc 1 (2). (Even though he be a Hindu son.)
- ('71) 8 Bom H C R A C 245 (248, 249).
- ('31) AIR 1931 All 368 (369). (Widow's maintenance amount after surrender of husband's estate is not liable to a decree against husband's estate.)
- ('97) 4 Cal W N 151 (152). (Where property is seized decree-holder must prove that it belongs to deceased and is not the private property of legal representative.)
- ('88) 1888 All W N 49 (50). (Do.)
- 2a. ('14) AIR 1914 Oudh 208 (208). (Zamindar is not a legal representative of the deceased tenant who leaves no heir and whose estate escheates to zamindar.)
- ('70) 5 Mad H C R 303 (309). (An unsettled Polliam in Madras presidency.)
- ('87) 10 Mad 117 (121). (Malabar Tarwad karnavan.)
3. ('80) 5 Cal 389 (412, 419). (Ghatwalli lands.)
- (1865) 4 Suth W R Misc 5 (6). (Do.)
- ('66) 6 Suth W R 129 (129). (Do.)
- ('67) 7 Suth W R 178 (178, 179). (Do.)
- ('96) 23 Cal 873 (876). (Do.)
- ('82) 9 Cal 187 (206, 208) : 9 Ind App 104 (PC). (Do.)
- ('82) 9 Cal 388 (388). (Do.)
- ('88) 15 Cal 471 (481, 482) : 15 Ind App 18 (PC). (Do.)
- ('84) 10 Cal 677 (684, 685). (Do.)
- ('85) 9 Bom 198 (212, 217, 232) (F B). (Vatan lands.)
- ('25) AIR 1925 Nag 449 (450). (Balance of sale proceeds from occupancy field of the deceased father's estate is not asset in the hands of the son—Money representing such property is also not liable.)
- ('06) 1906 Pun Re No. 123, p. 466.
- ('20) AIR 1920 Pat 468 (468). (But rent income accrued during deceased's lifetime though collected subsequently will be assets.)
- 3a. ('36) AIR 1936 Oudh 76 (79).

the assets of a deceased person in the hands of his heir, the rents and profits accruing since his death form part of his assets.<sup>4</sup> But in the case of lands attached to a hereditary office and which are inalienable, the income is not liable to attachment under this Section.<sup>5</sup> A right to a share of offerings in a temple which has been inherited by a person forms part of the assets of the deceased for the purpose of this Section.<sup>5a</sup>

Where a decree is passed against the assets of the deceased in the hands of the representative and the representative himself dies thereafter, the property in the hands of his heir or legal representative does not cease to be assets of the deceased debtor.<sup>6</sup>

**10. Property in the hands of a third party.**—When a person is sued as the legal representative of a deceased person for the recovery of a debt due by the deceased, and a decree is passed for money to be paid out of the assets of the deceased in the hands of the representative, the decree is nonetheless a decree against the legal representative. It refers to him as the judgment-debtor, and it follows that such a decree can be executed only against the representative who was made a defendant in the suit or his or her representatives.<sup>1</sup> As has been already mentioned in Section 50, Note 15, a judgment-creditor cannot in execution of his decree follow the assets of the deceased in the hands of transferees in good faith and for valuable consideration,<sup>2</sup> unless the transfers are affected by the doctrine of *lis pendens*<sup>3</sup> or the transferees knew that there were unpaid debts and that the transferor did not intend to apply the sale proceeds to pay them.<sup>4</sup> Even in such a contingency, the transfer not being a void

4. ('38) AIR 1938 Oudh 45 (45) : 13 Luck 689.

(Overruling AIR 1914 Oudh 233.)

('36) AIR 1936 Lah 236 (236).

('24) AIR 1924 Mad 530 (532, 533, 536, 537) : 47 Mad 411 (F B).

('82) 137 Ind Cas 632 (633) (Oudh.)

('32) AIR 1932 Lah 383 (383).

('17) AIR 1917 Mad 536 (537).

('28) AIR 1928 Oudh 40 (40) : 2 Luck 403.

('21) AIR 1921 Sind 29 (32, 33) : 15 Sind L R 47.

(Income or crops during lifetime of judgment-debtor liable, even though crops not liable as inalienable under Dekkhan Agriculturists Relief Act but not income or crops raised by successor after death of previous holder.)

('04) 8 Cal W N 843 (850, 852). (Accretions.)

('71) 15 Suth W R 285 (285, 286).

[But see ('97) 19 All 235 (236, 237). (Submitted wrongly decided.)]

5. (1865) 4 Suth W R Misc 5 (6). (Ghatwalli lands.)

('66) 6 Suth W R 129 (129). (Do.)

('67) 7 Suth W R 178 (178, 179). (Do.)

('96) 23 Cal 873 (876). (Do.)

('23) AIR 1923 All 169 (169, 170). (Inalienable property.)

('24) AIR 1924 Mad 707 (707). (Impartible estates.)

('13) 21 Ind Cas 272 (273) : 9 Nag L R 137. (Where Government rayat's holding is inalienable under Section 67E of the Central Provinces Land Revenue Act, 1881.)

('16) AIR 1916 Lah 313 (314). (Punjab Colonisation of Government Lands Act (5 of 1912) — Government tenant.)

('70) 5 Mad H C R 303 (310). (Unsettled Pollem

and revenue and income therefrom are not liable in hands of successor.)

('30) AIR 1930 Bom 238 (239). (Section 22, clause (2) Dekkhan Agriculturists Relief Act—Collector cannot be appointed to manage lands of deceased judgment-debtor in the hands of legal representative.)

5a. ('36) AIR 1936 All 131 (134) : 58 All 457.

6. ('14) AIR 1914 Mad 668 (669).

(1900) 22 All 367 (369, 370).

[See also ('88) 1938 Nag L Jour 176 (179).

#### Note 10

1. ('09) 3 Ind Cas 737 (738) : 33 Mad 75.

('30) AIR 1930 Cal 762 (763) : 58 Cal 170. (The right of a creditor to follow the assets in the hands of a legatee is a right which has to be exercised by a suit only.)

[See ('84) 10 Cal 860 (864) : 11 Ind App 59 (P C).]

2. (1863) Mar 509, Campbell v. Delaney.

(1865) 2 Suth W R 296 (297).

('69) 12 Suth W R 177 (178). (Obiter.)

('71) 14 Suth W R 239 (241, 244, 245, 246).

(Mahomedan widow's dower is on par with other debts. — A purchaser from the deceased Mahomedan is not bound to enquire into the existence of legal necessity.)

('81) 8 Cal L Rep 447 (448).

('80) 7 Cal L Rep 460 (462, 463).

('75) 3 Ind App 241 (245) (P C).

('79) 4 Cal 402 (403) : 5 Ind App 211 (P C).

('72) 9 Bom H C R 116 (119).

('97) 19 All 504 (505, 506.)

('69) 10 Suth W R 199 (201).

3. ('79) 4 Cal 402 (410) : 5 Ind App 211 (P C).

4. ('79) 4 Cal 897 (912, 914)

Whenever a decree is passed against the heir, it must be deemed to be executable only as provided in this Section, though the decree is erroneously passed as a personal decree.<sup>1a</sup>

It is for the decree-holder to prove in the first instance, that some assets belonging to the estate of the deceased came into the hands of the legal representative<sup>3a</sup> and then it is for the latter to satisfy the Court as to the extent of the assets received and to account for them.<sup>4</sup> He will be bound to account for all sorts of property that he got, such as money, moveables, immovables, accounts, papers, etc.<sup>3a</sup> If the defendant fails to satisfy the Court that he has duly applied the property of the deceased, he is personally liable to the extent of the property of which he has failed to satisfy the Court.<sup>4</sup> But sub-section (2) will apply only when no

- 1a. ('75) 24 Suth W R 383 (384).  
 ('21) 65 Ind Cas 224 (224) (Pat).  
 2. ('17) AIR 1917 Mad 536 (538). (Legal representative failing to satisfy the Court that he had personally liable.)  
 ('24) AIR 1924 Mad 466 (467, 469). (No proof of assets—Not liable.)  
 ('66) 3 Mad H C R 161 (164).  
 ('72) 18 Suth W R 185 (188) (P C).  
 ('76) 25 Suth W R 224 (224, 225).  
 ('68) 10 Suth W R 199 (200, 201).  
 ('67) 8 Suth W R 160 (161).  
 ('67) 8 Suth W R 198 (196).  
 ('70) 14 Suth W R 362 (362). (The decree-holder must satisfy the Court that no such property of the deceased can be found as can be sold in execution before he can execute the decree against heirs to the extent of property they inherited from the debtor.)  
 ('69) 12 Suth W R 238 (234).  
 ('96) 1896 Bom P J 226.  
 ('78) 3 Mad 42 (46).  
 ('14) AIR 1914 All 280 (281).  
 ('90) 4 Cal W N 151 (152).  
 2 Ind fur (NS) 234. (Brother taking possession, widow having relinquished—Liable as legal representative.)  
 ('73) 21 Suth W R 117 (118). (Son instead of objecting asked time for payment—Interference is should explain delay in proceeding against assets.)  
 ('78) 20 Suth W R 422 (424). (Decree-holder should explain delay in proceeding against assets.)  
 [But see ('86) 1888 All W N 49 (50).]

3. ('39) 181 Ind Cas 721 (725) (Pat).  
 ('37) AIR 1937 Rang 531 (538). (Question to be decided by executing Court and not in regular suit.)  
 ('17) AIR 1917 Mad 536 (538).  
 ('38) AIR 1938 Rang 309 (310).  
 ('38) AIR 1938 Rang 447 (447).  
 ('34) AIR 1934 Rang 93 (94).  
 ('11) 12 Ind Cas 253 (255) (Mad).  
 ('24) AIR 1924 Mad 466 (468).  
 ('76) 25 Suth W R 224 (224). (Before judgment-debtors can claim exemption from decree-holder's claim on ground that they have received a small asset from ancestor's estate or otherwise, they should prove and file the whole inventory of it.)

- (67) 8 Suth W R 195 (196).  
 ('68) 3 Mad H C R 161 (164).  
 ('71) 15 Suth W R 285 (285, 286).  
 ('65) 2 Suth W R 238 (238).  
 ('69) 12 Suth W R 233 (234).  
 ('15) AIR 1915 Cal 646 (646). (Legal representative's liability for intermeddling with minor's estate.)  
 ('86) 1888 All W N 49 (50).  
 ('57) 1887 Pun H C No. 87 p. 187.  
 ('73) 20 Suth W R 250 (252).  
 ('03) 26 Mad 501 (501, 502).  
 ('90) 1890 Bom P J 166 (166).  
 ('27) AIR 1927 Rang 127 (127); 5 Rang 44. (This question should be decided in execution under S. 47 and not by a regular suit.)  
 ('70) 14 Suth W R 181 (182). (But if question of possession of assets was raised and decided in suit itself, it cannot be agitated again in execution.)  
 3a. ('74) 22 Suth W R 388 (388, 389).  
 4. ('39) 181 Ind Cas 721 (725) (Pat). (Section 52 (2) of the Civil Procedure Code simply enacts a rule of procedure in accordance with natural justice, and even in the absence of that Section (and of any provision of law to the contrary) Courts would have been justified in applying the principle embodied in it as a rule of justice, equity and good conscience.)  
 ('38) AIR 1938 Mad 684 (686).  
 ('17) AIR 1917 Mad 536 (538).  
 ('33) AIR 1933 Rang 309 (310). (Question can be gone into in execution itself: AIR 1927 Rang 127 P.H.).  
 ('30) AIR 1930 Lab 204 (204).  
 ('69) 12 Suth W R 617 (617).  
 ('68) 10 Suth W R 199 (200).  
 ('78) 1 Cal L Rep 359 (360, 361).  
 ('30) AIR 1930 Lab 332 (333). (Lapse of time does not absolve judgment-debtor but may affect proof as to due application.)  
 ('96) 1896 Bom P J 226. (This question to be decided only in execution and not in suit.)  
 ('97) 20 Mad 446 (447). (Personal decree can be passed in suit.)  
 ('22) AIR 1922 Oudh 200 (200). (A person who without any right took possession of the property and disposed of a portion of it is liable for personal decree against him for the deceased person's debts.)

14. Manner of execution. — See Note 13 Foot-notes 1 to 5.

(10) 6 Ind Cas 397 (397) (Mad). (Unless assets came to them personal degree cannot be passed.) fresh application necessary to decide the question.) (109) 4 Ind Cas 839 (841) : 34 Bom 142. (Nor is a

5. ('37) AIR 1987 Pesh 80 (80).  
(13) AIR 1974 Cr 252 (1980). (Decree-holder's right to execute his decree against legal representative.)

(96) 30 Bom 270 (273).  
(95) 1895 Pun Re No. 68, p. 337.  
(99) 1 Ind Cas 1033 (1035) : 33 Ind C.  
(19) AIR 1919 Sind 49 (50) : 18 Sind L R 138.

(1969) 12 South W R 177 (178).  
[See (1970) 14 South W R 239 (241).  
inter se are settled.)  
(1909) 4 Ind Cas 1059 (1059) : 33 Mlad 6. (Decree-

9. (103) 35 Cal 1100 (1103).  
(103) 35 Cal 1100 (1103);  
1781) 8 Rom 370 (373, 374)

(S9) 16 CAL 1 (S),  
(S9) 16 CAL 603 (606, 609),

3. (21) AIR 1951 Mad 530, 531; 17 Mad 117 (121).

(10) 34 Bonn 516 (552).  
 511 (F B).

out of the assets of the deceased, as far as they go, to the exclusion of other creditors who have not obtained decrees. Section 323 of the Indian Succession Act (XXXIX of 1925) merely lays down a rule of procedure to be followed by the executor or administrator and does not control the operation of this Section.<sup>1</sup>

**15. Right of legal representative to question the validity of the decree.** — See Section 50 Note 7.

**16. Appeal.** — Such of the orders passed under this Section as satisfy the requirements of Section 47 are decrees and are appealable as such.

See Section 47 Notes 84 and 71a.

**53. For the purposes of section 50 and section 52, property**

**in the hands of a son or other descendant which is liable under Hindu law for the payment of the debt of a deceased ancestor, shall be deemed to be property of the deceased which has come to the hands of the son or other descendant as his legal representative.**

### Synopsis

1. Scope, applicability and object of the Section.
2. "Property in the hands of a son or other descendant."
3. "Which is liable under Hindu law for the payment of the debt of a deceased ancestor."
4. "Deceased ancestor."
5. "Decree."
6. "Property of the deceased."
7. "Legal representative."

### Other Topics (Miscellaneous)

Enforceability under this Section in execution and not by separate suit. See Note 1.  
Inapplicability of the Section to persons other than descendants. See Notes 2 and 3.  
Property not liable under this Section. See Notes 3 and 6.

**1. Scope, applicability and object of the Section.** — This Section is new. It was introduced for the first time in the Code in 1908. Under the Hindu law, an undivided son or other descendant who succeeds to the joint family property on the death of the ancestor, does so by right of *survivorship* and takes the property in his *own right* and not as *heir* of the ancestor.<sup>1</sup> He is not a legal representative of the deceased ancestor as defined in Section 2 clause (11).<sup>2</sup> But he is liable under the Hindu law by reason of his pious obligation, to pay the debts of his deceased ancestor,

4. ('72) 17 South W R 513 (514).  
(13) 18 Ind Cas 510 (510, 511) : 6 Low Bur Rui 158.

### Section 53 — Note 1

1. ('94) 16 All 449 (455, 457). (But self-acquired property is taken as heir.)
2. ('18) AIR 1918 Bom 165 (166) : 42 Bom 504. (Enforcement of injunction decree refused even under this Section.)

to the extent of the joint family properties in his hands. Under the old Code, the term "legal representative" was not defined, and there was a conflict of decisions as to whether a Hindu undivided son or other descendant could, so far as the ancestral property was concerned, be regarded as the legal representative of the deceased ancestor and whether the said liability could be enforced in *execution*, or only by a *separate suit*, inasmuch as the liability was quite distinct from, and independent of, the contractual liability of the ancestor or of the liability of a legal representative to pay the debts of the deceased out of the property of the deceased in his hands.<sup>1</sup> The High Courts of Madras<sup>2</sup> and Allahabad<sup>3</sup> held that the liability could be enforced only by way of a separate suit. The other High Courts held that it could be enforced in execution.<sup>4</sup> It is in order to settle this conflict of views in the procedure to be adopted for enforcing the said liability under Hindu law that this Section has been enacted.<sup>5</sup>

This Section is an explanation to Sections 50 and 52. The latter Sections provide for the remedies of a creditor against the properties of his deceased debtor in the hands of his legal representative. This Section explains the meaning of the words "property of the deceased." It also extends the meaning of the term "legal representative" as defined in Section 2 clause (11) by expressly making the son or other descendant of a Hindu, his legal representative in respect of the joint family property in his hands which is liable under Hindu law, for the satisfaction of the debt of the deceased ancestor.<sup>6</sup> Reading these Sections together, it is now clear that ancestral property in the hands of a son or other descendant can be proceeded against in *execution* as assets of the representative" liberally construed.)

- (10) 5 Ind Cas 146 (147) (Cal). (Decree was passed against son as legal representative—Stronger case than 31 Cal 642.)
- (10) 6 Ind Cas 582 (583, 589) (Cal). (Because no hardship is caused to debtors by shorter remedy—31 Cal 642 F B not inconsistent with Privy Council view in 5 Cal 148 and 18 Cal 157.)
- [But see (1900) 6 Cal W N 228 (225).]
8. (37) AIR 1937 Mad 610 (615) : 1 L R (1937) Mad 880 (F B).
- (34) AIR 1934 An 590 (592, 593, 594, 601) (F B). (Pious obligation subsists even where family consists of uncle and nephew.)
- (18) AIR 1918 Bom 165 (166, 167) : 42 Bom 504. (Section is both descriptive and limitative—Criticism in AIR 1924 Mad 571.)
- (24) AIR 1924 Mad 571 (573, 574). (Section not confined to money decrees only.)
- (28) AIR 1923 Pat 148 (147) : 6 Pat 451. (Allahabad and Madras view no longer law.)
- (31) AIR 1931 Sind 84 (86, 87) : 25 Sind L R 374. (Property acquired not by survivorship but by partition—Section applies.)
9. (37) AIR 1937 Mad 785 (785). (Reversed on another point by A I R 1939 Mad 552.)
- (36) AIR 1936 Bom 456 (459).
- (28) AIR 1923 Pat 143 (144, 147, 148, 149) : 6 Pat 451. (Son's liability is personal.)
- (24) AIR 1924 Mad 571 (573, 574, 575). (Decree in S. 58 is not limited to money decrees.)
- [See (38) AIR 1938 P C 7 (8) : 13 Luck 61 : 32 Sind L R 221 (P C). (Decree against sons and grandsons for debt due by deceased ancestor can be executed against judgment-debtors' interest in the joint family property.)
- brought on record under S. 23-A — "Legal (If the legal representative has been properly reached as assets in the hands of sons.)
- (07) 34 Cal 642 (647, 648, 661, 663, 657) (F B).
- proceedings have been taken to enforce the debt in father's lifetime, father's interest cannot be (07) 5 Cal L Jour 80 (85, 87). (Contra:—If no (06) 38 Cal 676 (677, 678).
- (89) 16 Cal 1 (6, 7).
- O. P. Code.)
- tion as to nature of debt lies under S. 244, old (09) 1 Ind Cas 459 (459, 460) : 33 Bom 39. (Objected old O. P. Code—11 Bom 37, followed.)
- ing nature of debt can be decided under S. 244, (96) 20 Bom 386 (389). (Objection as to binding nature of debt can be decided under S. 244, for secured debt also.)
- (99) 21 An 801 (805, 806, 807). (In case of decree (94) 16 An 449 (464).
- (94) 17 Mad 122 (127).
- (04) 14 Mad L Jour 381 (432).
- 282, 7 Mad 328, 10 Mad 283, Ponn.)
- (90) 13 Mad 265 (266, 267). (3 Mad 42, 5 Mad further are distinct.)
- ation and obligation created by decree against (88) 11 Mad 413 (415, 416). (Because pious obligation debt of record governed by Art. 120.)
5. (04) 27 Mad 213 (250—251) (F B). (Suit to recover debt of record governed by Art. 120.)
- against sons.)
- (Passing of decree gives fresh cause of action (10) 5 Ind Cas 362 (361, 363) : 33 Mad 423. relates to obligations created by decree.)
- (88) 11 Mad 413 (415). (S. 214 of O. P. Code 1882 (85) 8 Mad 376 (378).
4. (82) 5 Mad 223 (225).
- joint debtors not applicable to pious liability.)
3. (99) 21 An 801 (301). (Analogy of liability of

deceased in the hands of such descendant.<sup>10</sup> The descendant can, in such proceedings, show that in fact no pious obligation exists in view of the illegality or immorality or the non-existence of the debt.<sup>11</sup> In fact, a separate suit will be barred in respect of that matter by virtue of Section 47.<sup>12</sup>

It has been held by the High Court of Allahabad that this Section, being only a matter of procedure, can be applied even to pending cases, and that an order passed under the old Code can be reversed by the Appellate Court on the ground that Section 53 has been enacted in the meantime.<sup>13</sup> The Madras High Court has, on the other hand, taken a contrary view.<sup>14</sup> Where, however, in a prior order the decree has been construed to be restricted to the assets of the deceased in the restricted sense of the old Code, it becomes *res judicata*, and, thereafter, the present Section cannot be availed of, to increase the liability and attach it to the ancestral property in the hands of the descendant.<sup>15</sup>

There is nothing in this Section to justify the view that a suit for *administration* will lie where a Hindu father dies leaving no property of his own except his share in joint family property.<sup>16</sup>

See also Notes 3 and 4 below.

**2. "Property in the hands of a son or other descendant." —** The Section applies only where the joint family property passes by survivorship to a son or other descendant who is liable, under the Hindu law, to pay the ancestor's debts.<sup>1</sup> The only persons who, under the Hindu law, are under a pious obligation to pay their ancestor's debts are the son, the grandson and the great-grandson<sup>2</sup> and none else. Hence, the Section has no application where the property has passed into the hands of persons other than the ancestor's sons, grandsons and great-grandsons,<sup>3</sup> *ib. e. g.*, a brother,<sup>4</sup>

10. ('38) AIR 1938 P C 7 (8) : 13 Luck 61 : 32 Sind L R 221 (P.C.). (Ancestral property in the hands of grandsons.)  
(139) 181 Ind Gas 512 (514) (Pat). (Principle applies to award passed by Registrar of Co-operative Societies under Co-operative Societies Act.)  
(137) AIR 1937 All 559 (560).  
(136) AIR 1936 Bom 456 (458).  
(135) AIR 1935 Lah 855 (856) : 17 Lah 139.  
(135) AIR 1935 Pat 275 (280) : 14 Pat 732 (7B).  
(125) AIR 1925 All 471 (472). (A decree for costs against father.)  
(133) AIR 1933 All 110 (111). (Decree for amount not collected due to negligence—A I R 1928 All 166, Dissented from.)  
(130) 32 Bom L R 919 (922, 923). (A decree on partnership accounts.)  
(128) 116 Ind Gas 86 (86) (All). (Suit against father and sons of deceased debtor on prom-note—Liability of joint family property to be decided in execution.)  
(131) 133 Ind Gas 910 (911) (All).

## Note 2

1. ('24) AIR 1924 All 873 (875).  
(128) AIR 1928 All 539 (540) : 45 All 455. (Descendant means lineal descendant.)  
(137) AIR 1937 Oudh 327 (328) : 18 Luck 241. (26) AIR 1926 P C 105 (106, 107, 108) : 48 All 518 : 53 Ind App 204 (P.C.). (A I R 1924 P C 50 and 19 All 26 (7B) explained.)  
1b. ('37) AIR 1937 Mad 472 (474). (A decree obtained against a member of a joint family, even if it be for a debt binding on the family, cannot be executed against the shares of other members of the family unless they are the sons of the judgment-debtor.)  
1c. ('04) 27 Mad 106 (108). (Deceased brother was not sued in a representative capacity.)  
(16) AIR 1916 Bom 262 (263, 264) : 40 Bom 329. (He is not a legal representative.)  
(04) 31 Cal 224 (227). (Impartible estate—Rule of survivorship applies.)  
(06) 29 Mad 453 (460). (Brother took impartible estate by survivorship.)

father,<sup>2</sup> uncle<sup>3</sup> or nephew.<sup>4</sup> But if the property of the deceased passes into the hands of a son or other descendant, it does not cease to be liable for the debt even though the son or other descendant dies and even though the property has passed to his heirs.<sup>5</sup> Nor does it cease to be liable where it has passed to the son or other descendant *jointly* with other persons such as a grandfather or uncle; the reason is that the expression "in the hands of a son" does not necessarily mean property which is *exclusively* in the hands of a son or other descendant without any partner or coparcener. The expression stands for property belonging to the son or property in which he has a proprietary interest and which may be in his actual or constructive possession *joint* or *exclusive*.

See also Note 6, *infra*.

### 3. "Which is liable under Hindu law for the payment of the debt of a deceased ancestor?" — In order to ascertain the liability of property in the hands

of a son or other descendant for the debts of an ancestor, primarily the Hindu law itself and the decisions on the point should be referred to. A few broad aspects may, however, be mentioned here.

Under the Hindu law, a son or other descendant (son or grandson or great-grandson) is under a pious obligation to pay his ancestor's debt, but only to the extent of the joint family property in his hands, and provided that such a debt is not 'avyavaharika,' that is, neither illegal nor immoral.<sup>6</sup> The descendant is therefore entitled to

- (10) 5 Ind Cas 362 (364, 365).  
[See also] AIR 1935 Mad 145 (146), (Hindu brothers—Pro-note by elder—Decree on—Younger brother not impleaded—Execution against share of younger brother not allowable—S. 53 does not apply to such a case.)  
2. ('89) 11 All 302 (303, 304). (There was no attachment of son's share during his lifetime.)  
(26) AIR 1926 All 157 (158) : 48 All 4. (Interest of son was attached—Father held legal representative.)  
(15) AIR 1915 Nag 39 (40, 41) : 11 Nag L R 45.  
3. ('77) 2 Bom 479 (480).  
4. ('24) AIR 1924 All 873 (875). (Is not legal representative for the purposes of preparing final decree.)  
(10) 5 Ind Cas 362 (364, 365) (Mad).  
(10) 5 Ind Cas 362 (364, 365) (Mad).  
(23) AIR 1923 All 539 (540) : 45 All 455.  
(10) 6 Ind Cas 38 (39, 40) (All).  
(86) 8 All 495 (500, 501). (Grand nephew.)  
[See also] ('91) 18 Cal 157 (163, 164).  
5. ('14) AIR 1914 Mad 668 (668, 669). (Assets included in term "property" in this Section.)  
6. ('35) AIR 1935 Oudh 510 (515) : 11 Luck 449. (Section 53 enacts a rule of procedure only and is not intended to affect in any way the extent of a son's liability for his father's debts under the Hindu law.)  
(34) AIR 1934 All 590 (594, 595, 601, 603, 604) (F.B.). (A I R 1926 All 220, overruled.)  
(33) AIR 1933 Lah 857 (858) : 15 Lah 50.  
(34) AIR 1934 Lah 101 (101) : (A I R 1933 Lah 857, followed.)  
Note 3  
1. ('12) 16 Ind Cas 970 (970) (Cal). (Contention that under the Section father's share only attachable overruled.)

- (88) 11 Mad 373 (374). (Not the Contract Act.)  
2. ('38) AIR 1938 All 437 (440).  
(35) AIR 1935 Bom 287 (294).  
(35) AIR 1935 Lah 761 (762) : 16 Lah 1077.  
(35) AIR 1935 Lah 761 (762) : 16 Lah 1077.  
(04) 27 Mad 243 (246, 247) (F B). (Debt includes judgment-debt.)  
(32) AIR 1932 Pat 12 (13, 14).  
(33) AIR 1933 All 235 (237, 238, 241) : 55 All 283. (Even where joint family consists of persons other than father and sons.)  
(74) 22 Subh W R 56 (58) (P C).  
(07) 34 Cal 642 (651) (F B).  
(18) AIR 1918 Pat 391 (392) : 3 Pat L J 409 533.  
(23) AIR 1923 Mad 36 (37, 39, 41, 42) : 46 Mad 64. (During father's lifetime even.)  
(13) 19 Ind Cas 252 (252, 253) (All). (Decree for costs against father.)  
(18) AIR 1918 Pat 345 (347) : 3 Pat L J 409 396. ("Vyavaharika" was defined to mean "lawful," "usual" or "customary.")  
(18) AIR 1918 Bom 13 (14, 15) : 43 Bom 612. (Even during the lifetime of ancestor—"Vyavaharika" explained and discussed.)  
(30) 127 Ind Cas 507 (508) (Bom). (Trade debts of father.)  
(13) 19 Ind Cas 378 (379, 380, 383, 384) (Sind). A debt arising out of a decree for damages for breach of contract to sell trust property is not illegal or immoral debt—Meaning of vyavaharika.)  
(08) 32 Bom 348 (351, 352). (Decree for damages for wrongful obstruction of water course cannot be executed against sons.)  
(83) 6 Mad 293 (294). (Barred debt renewed by father—Son liable.)  
(88) 11 Mad 373 (374). (Surety debt of father.)  
(99) 23 Bom 454 (457, 460). (Do.)



that the father's share should be sold first.<sup>9</sup>

This Section does not affect the rule of Hindu law that the property of a coparcener which has been *attached in execution* of a decree in his lifetime<sup>9</sup> or which has been validly mortgaged by him<sup>10</sup> can be proceeded against even subsequent to his death. Nor does it affect the provision of Hindu law by which the whole of the family property can be sold in execution of a decree against the father or manager where the latter was sued in a representative capacity.<sup>11</sup> Nor again can the holder of a decree against the legal representative take advantage of S. 53 and attach ancestral property in the hands of the legal representative where the decree directs that it shall be realised from such property only as belonged to the deceased personally.<sup>12</sup>

There is a conflict of opinion as to whether in the case of Hindu impartible zamindari estates, the debts of a deceased zamindar are enforceable against the estate in the hands of the successor. See the undermentioned cases.<sup>13</sup>

The Jats and other tribes in the Punjab have power, under the customary law applicable to them, to alienate their properties during their lifetime for necessity; but if they die without exercising such power or before the property is attached in execution,

- (04) 27 Mad 243 (247) (F B).  
 (24) AIR 1924 Oudh 393 (398, 394) : 27 Oudh Cas 111.  
 (15) 26 Ind Cas 362 (362) (Mad).  
 (18) AIR 1918 Bom 13 (16, 19) : 48 Bom 612.  
 (25) AIR 1925 Bom 193 (193, 194) : 49 Bom 113.  
 (S. 2, Bombay Act 7 of 1866 not contravened.)  
 (12) 16 Ind Cas 970 (970) (Cal).  
 (31) AIR 1931 Sind 84 (85, 87) : 25 Sind L R 374.  
 (Section 53 applies—Property acquired by partition.)  
 (30) 127 Ind Cas 507 (508, 509) (Bom).  
 [But see (73) AIR 1935 Pat 275 (287) : 14 Pat 732 (F B). (Decree against father after partition—Son's share cannot be proceeded against.)]  
 8. (12) 13 Ind Cas 349 (349, 350) (Cal). (Decree for mesne profits—34 Cal 735, Distinguished.)  
 9. (85) 7 All 731 (732, 733). (Though attachment was defective.)  
 (14) AIR 1914 Mad 68 (68, 69). (Debtor undivided brother.)  
 (82) 4 Mad 302 (307).  
 (11) 9 Ind Cas 286 (286) (Mad).  
 (98) 8 Mad L Jour 64 (65, 66).  
 (84) 7 Mad 339 (340).  
 (93) 20 Cal 895 (898, 899).  
 (80) 5 Cal 148 (174) : 6 Ind App 88 (F C).  
 (06) 3 All L Jour 128 (129). (5 Cal 148, Followed.)  
 (07) 5 Cal L Jour 80 (85, 86, 87).  
 (94) 16 All 449 (453, 456). (There was no attachment during father's lifetime—Decree held not executable against sons.)  
 (06) 33 Cal 1158 (1162). (Order under S. 280, Civil P. C., 1882, does not put an end to attachment.)  
 (14) AIR 1914 Mad 118 (118). (Attachment before decree.)  
 (94) 17 Mad 144 (146). (Death before decree—Estate survives and attachment before judgment is of no avail.)  
 10. (91) 15 Bom 673 (674, 675).  
 after the said Act.)  
 not being father — 30 Mad 454 is no good law as debt by a manager of a joint Hindu family debts binding on successors to the same extent Madras Impartible Estates Act — Zamindar's (Section 4, (24) AIR 1924 Mad 511 (511, 512). (Section 4, (74) 21 South W R 420 (421). (No.)  
 (11) 12 Ind Cas 915 (918) (All). (No.)  
 (09) 3 Ind Cas 907 (908) (All). (No.)  
 (81) 3 Mad 42 (45, 46). (No.)  
 (06) 29 Mad 453 (460). (No.)  
 (04) 31 Cal 224 (227). (No.)  
 (02) 6 Cal W N 879 (881). (Yes.)  
 (93) 16 Mad 452 (453). (Yes — Decree against "Valia Raja" as representative of a Kovilagam.)  
 Mad 454, Referred.)  
 13. (09) 2 Ind Cas 18 (21, 22) (Mad). (Yes—30  
 12. (11) 9 Ind Cas 681 (681, 682) (All).  
 to be sued as manager — Family property held not liable.)  
 (82) 5 Mad 234 (235) (F B). (Father not shown (08) 16 C P L R 19 (21 to 25).  
 ruled by 15 Cal 70 (F C).  
 (90) 14 Bom 597 (603, 604). (11 Bom 700, Over-  
 (88) 15 Cal 70 (81, 82) : 14 Ind App 187 (F C).  
 question of res judicata.)  
 (30) AIR 1930 Mad 206 (207, 208). (Decision on  
 (24) AIR 1924 Mad 571 (573).  
 (99) 23 Bom 372 (374, 375).  
 All 388 (F C).  
 (14) AIR 1914 F C 136 (137) : 41 Ind App 216 : 36  
 (97) 21 Bom 616 (618, 619).  
 (80) 2 All 746 (752).  
 not allowed to be raised in execution.)  
 Mad 880 (F B). (Plea of partition before decree  
 11. (37) AIR 1937 Mad 610 (618) : ILR (1937)  
 [See (35) 8 Mad 376 (378).]  
 property.)  
 L Jour 451. (Decree was for sale of ancestral  
 (23) AIR 1923 Pat 148 (147, 148, 149) : 6 Pat  
 (99) 21 All 301 (305, 306, 307, 308).  
 (06) 33 Cal 676 (677, 678).  
 (05) 15 Mad L Jour 486 (486).

the estate ceases to be liable in the hands of their sons.<sup>14</sup> They can attack the decree not only on the ground of the illegality or the immorality of the debt, but also on the ground of want of necessity; and this question can be raised even in execution as it relates to the liability of the judgment-debtor's property for the decree.<sup>15</sup>

Under Section 5 of the Bombay Hereditary Offices Act (3 of 1874) *watan* property is not saleable to non-watan-dars. Hence watan property in the hands of a descendant is not saleable for debt of the deceased ancestor.<sup>16</sup>

4. "Deceased ancestor."—The pious obligation of the son or other descendant under the Hindu law exists whether the ancestor is alive or dead.<sup>17</sup> This Section, however, deals with the obligation *after* the death of the ancestor, and cannot be extended to a case where the ancestor is living.<sup>18</sup> But, independently of this Section, on general principles, if the family continues to be joint at the time when execution is sought, the son's share also in the joint family property can be proceeded against in execution of the decree against the father, even during the lifetime of the father.<sup>19</sup> The reason is that in such a case, the son's share will be property which the father can transfer to pay off his own debts. But, where at the time when execution is sought, partition has taken place between the father and the sons, the shares allotted to the sons at such partition cannot be proceeded against in execution during the lifetime of the father,<sup>20</sup> as in such a case, the father will not have any power of alienation over the share of the sons.

There is a conflict of decisions as to whether in a case where partition has taken place but the father is dead at the time of execution, the shares allotted to the sons at such partition can be proceeded against in this Section. One view is that under this Section, such share can be proceeded against in execution,<sup>21</sup> while the other view is that such share cannot be so proceeded against in execution.<sup>22</sup>

14. (136) AIR 1936 Lah 21 (23) : 17 Lah 183. (Watan of Punjab—Case relating to.)
- (136) AIR 1936 Lah 167 (168).
- (135) AIR 1935 Lah 855 (856) : 17 Lah 139. (Among Khargas of Lyallpur District there is no custom making the property inherited by the son liable for the ancestors' debts.)
- (111) 11 Ind Cas 375 (376) (Lah).
- (111) 11 Ind Cas 376 (376, 377) (Lah).
- (112) 15 Ind Cas 866 (868, 869) (F B) (Lah). (1894 Pun Re No. 24 not followed.)
15. (12) 13 Ind Cas 670 (671) (Lah).
16. (134) AIR 1934 Bom 116 (117, 118, 119) : 58 Bom 218.
- [See also (134) AIR 1934 Bom 119 (120) : 58 Bom 273. (Watan-dar has only his interest in the property and the watan property in the hands of successor is not liable for debts of previous watan-dar.)]
- Note 4
1. (124) AIR 1924 P C 50 (55, 56) : 46 All 95 : 51 Ind App 129 (P C).
- (101) 28 All 206 (208). (Son's liability arises as soon as father fails to discharge his obligation.)
2. (136) AIR 1936 Oudh 139 (140) : 11 Luck 528. (14) AIR 1914 Mad 328 (330) : 38 Mad 1120.
3. (138) AIR 1938 Nag 24 (27) : 1 L R (1938) Nag 136.
- (137) AIR 1937 Pat 517 (518).
- (135) AIR 1935 All 507 (508).
- [See (137) AIR 1937 Nag 45 (50) : 1 L R (1938) 136.]

6. (137) AIR 1937 Mad 813 (815, 816).
- (135) AIR 1935 Nag 11 (12). (A I R 1931 Sind 84, Dissented from.)
- (135) AIR 1935 Pat 275 (287, 288) : 14 Pat 732 (F B). (Debt incurred by father while family was undivided—Subsequent partition—Then decree against father alone—Son's shares cannot be

## 5. "Decree." — For definition of "decree," see Section 2 clause (2) *ante*.

The Section applies only if there is a *decree* in respect of the debt sought to be realised out of the property of the deceased.<sup>1</sup> It has been held by the High Court of Madras that the word "decree" in the Section is not limited to *money decrees* passed against the ancestor, but also includes decrees against property. Thus, according to that Court, a decree passed in respect of joint family properties against the father can be executed against the sons after the father's death.<sup>2</sup> The reason seems to be that, where a descendant has received property which, under Hindu law, would be liable to satisfy the ancestor's debts, if any, the descendant becomes a legal representative of the ancestor for *all* purposes and that *every* decree got against the ancestor, whether money decree or not, can be executed against him. The High Court of Bombay has, on the other hand, held that a decree for injunction against an ancestor could not be executed against the descendants on the ground that they were not the legal representatives of the ancestor and that the object of the Section is not merely descriptive but also limitative.<sup>3</sup> The Section has no application to the execution, against legal representatives, of *mortgage* decrees obtained against the ancestor. Where, therefore, a decree passed under Order 34 determines unconditionally that certain property is chargeable and shall be sold, the legal representatives of the judgment-debtor cannot, in execution, raise the plea that the mortgage debt was immoral or illegal.<sup>3a</sup>

The Section only applies where the decree sought to be executed against a person is *binding* on such person. Thus, where a suit is brought against the sons and grandsons of a deceased Hindu for the recovery of a debt due by the deceased but the suit is dismissed against the grandsons and is decreed only against the sons, the decree will not bind the grandsons and the interest of the latter in the joint family cannot be proceeded against in execution of such decree.<sup>3b</sup>

A decree passed by the Privy Council against a respondent (who is a Hindu) who dies pending the appeal is not a nullity (See O. 22 R. 4, Note 19) and can be executed against the property coming into the hands of his sons under this Section.<sup>3c</sup> A decree against a son or other descendant is not a *personal* decree against him but is only one against the assets in his hands.<sup>4</sup>

## 6. "Property of the deceased." — The words "property of the deceased" do not include the self-acquisitions of the son or other descendant himself.

### Illustration

A and his son B form members of a joint Hindu family. B has got his own *self-acquired* or *separate property* over which A has no control. A dies. The separate property of B cannot be proceeded against in execution of a decree against A as "the property of the deceased."<sup>1</sup>

The word "property" is used in this Section in its ordinary and general sense. Thus, although lands inherited by the son of an agriculturist cannot be attached under certain special Acts such as the Dekkhan Agriculturists' Relief Act and the Bombay

proceeded against in execution (Per Mohammad Noor and Agarwala JJ. — Per Wort J. contra.)

- Note 5
1. ('27) AIR 1927 All 683 (684).
  2. ('24) AIR 1924 Mad 571 (573, 574, 575).
  3. ('18) AIR 1918 Bom 165 (166) : 42 Bom 504.
  - 3a. ('34) AIR 1934 Lah 438 (439, 441) : 15 Lah 772. (Executing Court must execute the decree as it stands.)
  - 3b. ('38) AIR 1938 F C 7 (8) : 13 Luck 61 : 32 Sind L R 221 (P C).
  - 3c. ('37) AIR 1937 Pat 321 (322) : 16 Pat 316.
4. ('37) AIR 1937 Mad 813 (816). (Son's separate property cannot be proceeded against in execution.)
- (35) AIR 1935 Bom 287 (292).
- (21) 65 Ind Cas 224 (224) (Pat). (Decree construed in the light of S. 52.)
- (32) AIR 1932 Pat 12 (13, 14). (Decree in this case was in general terms — Court must find out the basis of decree.)
- (32) AIR 1932 Bom 522 (523). (The Section settles the question of procedure.)
- Note 6
1. ('34) AIR 1934 Mad 173 (174) : 57 Mad 440.

Hindu Heirs' Relief Act VII of 1886, yet the rents thereof are assets in the hands of the son.<sup>2</sup> Similarly, forest dues which have become due after the death of the father and received by the son can be proceeded against under this Section.<sup>3</sup> But a gratuity given to the heir of a deceased employee by a railway administration is purely a personal one and cannot be attached as assets of the deceased.<sup>4</sup> Similarly, the provident fund to the credit of deceased ancestor and paid to his minor son under the Provident Funds Act (XIX of 1925) is, under Section 3 thereof, the property of the son and is not an asset of the ancestor within the meaning of this Section.<sup>5</sup>

**7. Legal representative.**—For the definition of 'Legal Representative,' see Section 2 clause (11). See also Note 1 above.

**54. [S. 265.]** Where the decree is for the partition of an undivided estate assessed to the payment of revenue to *the Crown*, or for the separate possession of a share of such an estate, the partition of the estate or the separation of the share shall be made by the Collector or any gazetted subordinate of the Collector deputed by him in this behalf, in accordance with the law (if any) for the time being in force relating to the partition, or the separate possession of shares, of such estates.

[1877, S. 265; 1859, S. 225; See Ss. 67 to 72.]

a. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "the Government."

### Synopsis

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| <ol style="list-style-type: none"> <li>1. Legislative changes.</li> <li>2. Scope, object and applicability of the Section.</li> <li>3. "Estate," meaning of.</li> <li>4. Partition decree, meaning of.</li> <li>5. "Shall be made by the Collector."</li> </ol> | <ol style="list-style-type: none"> <li>6. In accordance with law relating to partition.</li> <li>7. Remedies against the Collector's action.</li> <li>8. Appeals.</li> <li>9. Decree for partition, when and how may be passed.</li> </ol> |
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### Other Topics (Miscellaneous)

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| <p>Applicability of the Section if joint liability to revenue is affected and not otherwise. See Note 2.</p> <p>Applicability of the Section to lands leased from Government for a term. See Note 3.</p> <p>Applicability of the Section to ryotwari estates or temporarily settled estates. See Note 3.</p> <p>Applicability for estates assessed in a lump sum and inapplicability to Burma paddy holdings. See Note 3.</p> <p>Consent of parties not giving jurisdiction to Civil Court for this Section. See Note 5.</p> | <p>Contents of the partition decree under this Section. See Note 4.</p> <p>Division of Civil Court to be followed by Collector except to avoid prejudice to revenue. See Note 7.</p> <p>Division by Collector in cases not properly coming under this Section, valid, if no objection is taken before division. See Note 7, F-N (13).</p> <p>Inapplicability of the Section to a share or plot short of a co-sharer's share. See Note 8.</p> |
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2. ('29) AIR 1929 Bom 233 (234, 235) : 53 Bom 463.
3. ('30) AIR 1930 Nag 134 (134).
4. ('23) AIR 1923 Oudh 21 (21, 22) : 26 Oudh Cas 53.
5. ('34) AIR 1934 Mad 173 (174) : 57 Mad 440.

Inapplicability to a partition of specific land within an estate, whether "perfect" or "imperfect" partition, under Assam Land and Revenue Regulation. See Notes 3, 6 and 7. Jurisdiction of Civil Court where Collector has no powers as per revenue laws. See Note 7. Meaning of "assessed to Government revenue." See Note 3. Meaning of "undivided estate" in this Section. See Note 2.

### 1. Legislative changes. — The words "or any gazetted subordinate of the Collector deputed by him in this behalf" are new. Other alterations are merely verbal.

**2. Scope, object and applicability of the Section.** — This Section deals with a case in which a Civil Court can *pass a decree* but cannot itself *execute* it. That has to be effected by the Collector. Sections 68 to 72, *infra* deal with another class of cases in which also the decrees passed by the Civil Court have to be executed only by the Collector. The reason for the provision in this Section restricting the ordinary powers of the Civil Courts to execute their own decrees is two-fold: *firstly* the Revenue Authorities are more conversant, and better qualified to deal with such matters than the Civil Court<sup>1</sup> and *secondly* the interests of the Government with regard to the revenue assessed on the assets would be better safeguarded by the Collector executing the decree than by the Court.<sup>2</sup> The Section does not apply to decrees other than decrees for partition, or separate possession of a share of an undivided revenue paying estate.<sup>3</sup> Nor does it apply even to decrees for partition or separate possession of such estates, save where as a result of partition the revenue might be affected.<sup>4</sup> Where, therefore, no *separate* allotment of the revenue is asked for and the *joint liability* of the shares for revenue in respect of the whole estate is left unaffected, this Section has no application.<sup>5</sup> But where a prayer is made for division of revenue in the suit, the Section becomes applicable though the prayer is made, not by the plaintiff, but by a defendant.<sup>6</sup>

The Section applies only to a case where the decree contemplates the partition of the whole of the estate paying revenue to Government. It does not apply where the decree is for separate possession of a share of a portion of an undivided estate.<sup>7</sup> The word "estate" must be taken to be used in its ordinary significance<sup>1</sup> and not in the limited sense in which it may

### Section 54 — Note 2

1. (18) AIR 1918 Bom 206 (207) : 42 Bom 689.
2. (88) 15 Cal 198 (201).
- (1938) AIR 1938 Mad 259 (259) : 56 Mad 443.
3. (84) 8 Bom 539 (541). (Decree in a suit for ejectment of tenants from specified land is not a decree for a separate possession of a share against co-shares as contemplated by this Section.)
- (84) 1884 All N 118 (118) : 2 All 778. (Decree for restoration on redemption of lands held separately.)
- (17) AIR 1917 Low Bur 126 (127) : 8 Low Bur 1388. (Decree in an administration suit.)
- (31) AIR 1931 Cal 104 (105).
- (31) AIR 1931 Cal 98 (94, 95) : 58 Cal 122. ('Mouza' not a revenue paying estate.)
4. (88) 10 All 5 (8).
5. (87) 24 Cal 725 (734, 737, 742, 745) (FB).
- (38) AIR 1938 Pesh 101 (103).

- (34) AIR 1934 Pat 365 (366) : 13 Pat 637.
- (81) 7 Cal 153 (155).
- (88) 15 Cal 198 (200).
- (89) 16 Cal 203 (205).
- (88) 10 All 5 (7, 8).
- (09) 1 Ind Cas 549 (550) : 36 Cal 726.
- (17) AIR 1917 Pat 637 (638) : 2 Pat 1 Jour 221.
- (18) AIR 1918 Pat 63 (64) : 4 Pat 1 Jour 29.
- (17) AIR 1917 Low Bur 126 (127) : 8 Low Bur 1338.
6. (31) AIR 1931 Cal 93 (94, 95) : 58 Cal 122. [See also (34) AIR 1934 Pat 365 (366) : 13 Pat 637. (Partition decree by Civil Court — Collector's partition does not supersede it.)]
7. (38) AIR 1938 Mad 259 (259) : 56 Mad 443.
- (31) AIR 1931 Cal 104 (105).
- Note 3.
1. (34) 10 Cal 435 (435, 440).

Nature of partition suits and applicability of bar of "res judicata" to them. See Note 9. Non-liability of Revenue Officers to draw up a formal decree even where the title is gone into. See Note 6. Partition at the instance of Hindu widow and the governing principles. See Note 9. Remedy against Collector's mistake—Application under Section 47 and not separate suit. See Note 7. Terms of decree binding on Collector. See Note 7.

be used in other Acts.<sup>2</sup> There is a conflict of opinion as to whether the Section applies to *temporarily settled* estates or only to *permanently settled* estates and not to property temporarily settled, such as property held on *ryotwari* tenure.<sup>3</sup> A contrary view has been taken by the Bombay High Court. According to it, the Section applies even to property temporarily settled, such as *sheri* lands or lands held under a lease from Government for a fixed period.<sup>4</sup> According to the Rangoon High Court, the Section is meant to be applied only to estates assessed to revenue in *one lump sum* for the whole estate and not to estates like the ordinary paddy lands in Burma which are assessed at acre rates.<sup>5</sup> According to the Allahabad High Court the word "estate" cannot be taken to mean isolated plots of land which fall short of being the share of a co-sharer of a *malhal*.<sup>6</sup> Where a land is an estate to which the Section applies, the crops attached to the land<sup>7</sup> and trees growing thereon<sup>8</sup> will go with the land and can be dealt with by the Collector in the same way as he can deal with the land.

**4. Partition decree, meaning of.**—A decree for the partition of an undivided estate assessed to the payment of revenue must be drawn up as provided by O. 20 R. 18 clause (1); that is, it should declare rights of the several parties interested in the property but should direct the actual partition to be done by the Collector or gazetted subordinate of the Collector deputed by him in that behalf. It is a joint declaration of the rights of persons interested in the property sought to be partitioned and is a decree, when properly drawn up in favour of each share-holder or set of share-holders having a distinct share.<sup>9</sup> It has been held by the Sind Judicial Commissioner's Court that where the decree gives no such directions as are required by O. 20 R. 18 clause (1), it is incumbent on the plaintiff to have it corrected within the time allowed by law, and if this is not done, he cannot ask the Court to transfer the proceedings to the Collector.<sup>10</sup> The partition contemplated by this Section is not confined to a mere *division* of the lands but includes also the *delivery* of the shares to the respective allottees, thus completely *carrying out* the partition.<sup>11</sup>

**5. "Shall be made by the Collector."**—As has been seen in Note 2, the Civil Courts have, under this Section, jurisdiction to try and decide suits for partition or separate possession of estates of the kind contemplated by the Section but have no power to *execute* the decrees passed in such suits.<sup>12</sup> Even the initial application for an

2. ('84) 10 Cal 435 (440).

3. ('83) 6 Mad 97 (97).

(('84) 7 Mad 382 (384) (PB).

4. ('92) 16 Bom 528 (532).

5. ('26) AIR 1926 Rang 80 (80) : 5 Rang 206.

6. ('84) 6 All 452 (454).

[See also ('06) 32 Cal 1036 (1049). (Case purely

under the Assam Land and Revenue Regula-

tion, I of 1886. See Ss. 96 and 154 as to mean-

ing of "Imperfect partition.")

(('81) AIR 1931 Cal 104 (105). (Only an eighth annas

share in only one of several mouzas comprised

in an estate is not an "estate.")]

[But see ('88) 10 All 5 (8). (6 All 452, Distin-

guished.)]

7. ('27) AIR 1927 Nag 300 (301).

8. ('01) 23 All 291 (297, 304, 305) (PB).

#### Note 4

1. ('78) 3 Cal 551 (552, 553).

(('74) 1874 Bom F J 384 (384).

(('81) 8 Cal L Rep 367 (368).

(('88) 15 Cal 198 (200, 201).

(('15) AIR 1915 Oudh 28 (29).

1. ('92) 16 Bom 528 (532).

Note 5

(('20) AIR 1920 Nag 204 (204).

(('27) AIR 1927 Nag 300 (301).

2. ('87) 11 Bom 663 (663).

1a. ('85) AIR 1935 Sind 192 (192).

amongst defendants interest is asked for or

agreed to, the Court cannot give a decree in

favour of defendants also.)]

(('90) 12 All 506 (508, 509). (Where no partition

Low Bur Rul 338.

[See also ('17) AIR 1917 Low Bur 126 (127) : 8

(('99) 23 Bom 188 (190). (Mahomedan family.)

(('83) 9 Cal 568 (570).

(('99) 22 Mad 494 (499).

Civil Court itself.<sup>2</sup> In respect of some orders and acts the jurisdiction of the Civil Courts is expressly excluded.<sup>3</sup> As to the Civil Court's power to control the execution, by the Collector, of the decree passed under this Section, see Note 7 above.

**9. Decree for partition, when and how may be passed.**—For the form of decree to be passed under the Section, see O. 20 R. 18, clause (1).

Where a decree declaring a right to partition has not been given effect to and the decree has, by lapse of time or otherwise, become unenforceable, it is open to the parties, if they still continue joint, to sue afresh for partition.<sup>1</sup> Similarly, where a suit for partition is dismissed for *default*, a fresh suit for partition can be maintained notwithstanding O. 9 R. 5 of the Code.<sup>2</sup> The reason is that the right to enforce partition is a legal incident of a joint tenancy and as long as such tenancy exists, so long may any one of the joint tenants apply to the Court for partition of the joint property.<sup>3</sup> But where the shares *have been separated* as per the Civil Court's decree, the decree is final and cannot be re-opened by a fresh suit.<sup>4</sup>

All interests in estates such as subordinate tenures of a fractional share of an estate<sup>5</sup> or the estate of a Hindu widow<sup>6</sup> can be partitioned provided there is no incon-venience caused thereby to the other shares or persons owning interests in that estate. But the partition should be complete, that is, should embrace *all the properties* in which the plaintiff is interested<sup>7</sup> and should be effected between *all persons* interested therein.<sup>8</sup> As has been seen already in Note 4 above, the decree under this Section is a *joint decree* in favour of all the sharers. It follows that for purposes of limitation steps taken by one of them will save limitation in favour of all.<sup>9</sup> There can, however, be no decree in favour of sharers who do not agree to, or ask for, a partition of their own shares.<sup>10</sup> Nor can there be a decree in favour of any sharer where the plaintiff's suit is itself dismissed.<sup>11</sup>

Where there is a decree in favour of the plaintiff and none in favour of the defendants, the latter's shares cannot be partitioned in execution of the decree.<sup>12</sup>

(189) 1659 Pun Re No. 73, p. 279. (Act XXIII of 1871 since superseded by Act XVII of 1887 and rules of the revenue authorities.)  
2. (91) 18 All 309 (312). (Note: 18 All 309 was overruled by 28 All 291 (F B) on the question of Civil Court's power to decide questions of title where Collector refused to go into that question or disregarded S. 119 of Act XIX of 1873.)  
3. (01) 28 All 291 (303) (F B). (Act XIX of 1878, S. 241 (f).)

#### Note 9

1. (18) 17 Ind Cas 955 (956): 37 Bom 307.  
(91) 18 All 309 (313, 314).  
2. (06) 28 All 627 (628, 629).  
3. (06) 28 All 627 (628).  
4. (18) AIR 1918 Pat 68 (64): 4 Pat L Jour 29. (20) AIR 1920 Nag 204 (204). (So also where allotment of shares alone was made by Collector without delivery of possession.)  
5. (05) 1 Cal L Jour 40 (42). (Where plaintiff was not jointly interested in the proprietary interests of defendants though defendants interest were so interested.)  
(97) 24 Cal 575 (582, 583) (F B). (Balance of convenience should be considered.)  
6. (83) 9 Cal 244 (250). (*Held*, widow's estate is

not an estate for life under S. 10, Bengal Act VIII of 1876—But Courts shall see that interests of presumptive reversioners are not affected.)  
7. (10) 7 Ind Cas 559 (565); 34 Ind 269. (Except-  
tion—Certain items of family property conveyed by one coparcener for purposes not binding on the family—The alienee from the other co-  
partner of his share in the said property may sue for his share in the said items without suing for general partition.)  
(81) 7 Cal 577 (581).  
(86) 12 Cal 566 (569).  
(87) 14 Cal 122 (123).  
(1900) 24 Bom 128 (130, 133).  
(94) 18 Bom 611 (613).  
8. (81) 7 Cal 577 (581). (Co-landlords granting  
leases of their shares to different lessees—In a  
suit for partition by lessees the landlords must  
be impleaded.)  
9. (78) 3 Cal 551 (552).  
10. (90) 12 All 506 (509). (Mahomedan family.)  
[See (93) 28 Bom 184 (186). (In such cases Court  
has a discretion.)]  
11. (07) 31 Bom 271 (292). (As plaintiff not  
entitled to any share in the property.)  
12. (84) 1884 All W N 215 (216).  
(99) 23 Bom 184 (186, 187).

## ARREST AND DETENTION

55. [S. 336.] (1) A judgment-debtor may be arrested<sup>3</sup> in execution of a decree at any hour and on any day,<sup>4</sup> and shall, as soon as practicable,<sup>5</sup> be brought before the Court, and his detention may be in the civil prison of the district in which the Court ordering the detention is situate, or, where such civil prison does not afford suitable accommodation, in any other place which the *Provincial Government* may appoint<sup>6</sup> for the detention of persons ordered by the Courts of such district to be detained :

Provided, firstly, that, for the purpose of making an arrest under this section, no dwelling-house shall be entered after sunset and before sunrise :

Provided, secondly, that no outer door of a dwelling-house shall be broken open<sup>7</sup> unless such dwelling-house is in the occupancy of the judgment-debtor and he refuses or in any way prevents access thereto, but when the officer authorized to make the arrest has duly gained access to any dwelling-house, he may break open the door of any room in which he has reason to believe the judgment-debtor is to be found :

Provided, thirdly, that if the room is in the actual occupancy of a woman who is not the judgment-debtor<sup>8</sup> and who according to the customs of the country does not appear in public, the officer authorized to make the arrest shall give notice to her that she is at liberty to withdraw, and, after allowing a reasonable time for her to withdraw and giving her reasonable facility for withdrawing, may enter the room for the purpose of making the arrest :

Provided, fourthly, that, where the decree in execution of which a judgment-debtor is arrested, is a decree for the payment of money and the judgment-debtor pays the amount of the decree and the costs of the arrest to the officer arresting him, such officer shall at once release him.

(2) The *Provincial Government* may, by notification in the *Official Gazette*, declare that any person or class of persons whose arrest might be attended with danger or inconvenience<sup>9</sup> to the public shall not be liable to arrest in execution of a decree otherwise



judgment-debtor unless asked to do so.<sup>7</sup> An arrest is not accomplished unless the officer touches the person of the judgment-debtor.<sup>7a</sup> Where a warrant of arrest has been executed by a person authorised to do so by Nazir, the fact that the endorsement was subsequently made irregularly by the Nazir will not invalidate the arrest.<sup>8</sup>

**4. "At any hour and on any day."**—An arrest is not illegal because it was made on a Sunday<sup>1</sup> or on a day on which the Court was closed.<sup>2</sup>

**5. "As soon as practicable."**—It is the duty of the officer arresting a judgment-debtor to bring him before the Court "as soon as practicable." But this does not mean that, if the Court is closed for the vacation, he should take the judgment-debtor to the Court building or to the Judge of the Court at his private residence. The judgment-debtor should be produced at the next sitting of the Court, and in the meantime, the arresting officer is empowered to confine him even in the decree-holder's house.<sup>1</sup>

**6. "In any other place which the Provincial Government may appoint."**—The imprisonment of the arrested person must be either in the civil prison of the district in which the Court ordering the detention is situate, or in any other place which the Provincial Government may appoint. Where a debtor committed to a particular jail is handed over by the officer arresting him of his own motion, to the officer in charge of a *different* jail, the imprisonment is unlawful and the prisoner is entitled to be discharged.<sup>1</sup>

For a list of places appointed by the Provincial Government under this Section, see the undermentioned notifications.<sup>2</sup>

**7. Breaking open of outer door.**—Under Section 336 of the old Code no outer door of a dwelling-house could be broken open under any circumstances. Under the present Section, the outer door may be broken open if —

(1) such a dwelling house is in the occupancy of the judgment-debtor, and

(2) he *refuses* or in any way *prevents* access thereto.

The object of this change in the law is to prevent vexatious forms of resistance to execution which constantly obstruct decree-holders in the execution of their decrees.<sup>1</sup>

**8. Where room is in the occupancy of a woman, not a judgment-debtor.**—The third proviso to sub-section (1) only applies where the room is in the occupancy of a woman who is *herself* the judgment-debtor against whom a warrant of arrest was issued, as, for instance, in execution of a decree for restitution of conjugal rights,<sup>1</sup> the

7. (21) AIR 1921 Cal 79 (79, 80). (Apprising the judgment-debtor of the contents of the warrant is sufficient.)

7a. (30) AIR 1930 Rang 131 (132) : 7 Rang 598. (Or unless there is submission to custody by word or action, (S. 46, Cr. P. Code and English cases relied on.)

8. (84) 6 All 385 (388). (95) 22 Cal 596 (608). (Delegation by Nazir to process-server.)

(95) 22 Cal 759 (761). (Do.)

Note 4

1. (69) 4 Mad H C R App. LXII.

(74) 7 Mad H C R 285 (286). (Lord's Day Act

does not apply to India.)

(68) 10 South W R 350 (351). (Do.)

in execution of a decree for money.)

1. See (68) 1 Beng L R 31 (32, 43, 46, 48) (F.B.). (Application for arrest of a *pardanashin* woman)

Note 8

1. See report of the Select Committee — Notes on Clauses.

Note 7

1. See report of the Select Committee — Notes on Clauses.

2. Notification No. 217, Burma Gazette, 1897, Part I, p. 256, Fort St. George Gazette, 1903, Part I, p. 646.

Note 6

1. (85) 11 Cal 527 (530). 2. Notification No. 217, Burma Gazette, 1897, Part I, p. 256, Fort St. George Gazette, 1903, Part I, p. 646.

Note 5

1. (07) 30 Mad 179 (180, 181). (No offence of wrongful confinement.)

Note 5

2. (07) 30 Mad 179 (180).

proviso has no application.<sup>2</sup>

**9. Exemption of persons whose arrest might be attended with danger or inconvenience.**—This sub-section is new and is intended to cover the cases of certain persons or classes of persons whose summary arrest might, as in the case of railway servants, be attended with danger or inconvenience to the public.<sup>1</sup> But, where a suit is brought against such persons, the fact that they could not be arrested in execution is no ground for not passing a *decree* against them.<sup>2</sup>

**10. Court's duty to inform judgment-debtor that he may apply to be declared insolvent.**—Where a judgment-debtor is arrested and brought before the Court, it is the duty of the Court to inform him that he may apply to be declared insolvent.<sup>1</sup> This, however, is unnecessary where he has *already applied* in insolvency and the application is pending.<sup>2</sup> The Court has, in such a case, a discretionary power not to put the warrant in force if the judgment-debtor furnishes security for his appearance when called upon.<sup>3</sup> Similarly, in a case where the judgment-debtor has already applied in insolvency and his application has been *dismissed* by the Insolvency Court and he is *re-arrested*, the executing Court need not inform him that he may apply to be declared insolvent, or take the other steps indicated in sub-section (3). The reason is that until the order of dismissal of the insolvency application is set aside with the permission of the Insolvency Court the judgment-debtor cannot apply again to be declared an insolvent.<sup>4</sup>

The provisions of sub-section (3) or the mere fact of arrest will not, however, entitle the debtor to be adjudged an insolvent except in conformity with the provisions of the insolvency law.<sup>5</sup>

Under the Codes of 1877 and 1882, the provisions corresponding to this sub-section did not apply to the presidency towns<sup>6</sup> nor to Provinces which were not notified by the Local Governments.<sup>7</sup>

**11. Security bond to be given by the judgment-debtor.**—This Section applies only where the judgment-debtor is *under arrest*. Where he is already committed to jail, he can only be discharged under Section 58, *infra*.<sup>1</sup>

The judgment-debtor brought under arrest must furnish security—

1. that he will, within one month, apply to be declared insolvent, and

2. ('81) 7 Cal 19 (20, 21) (Note)—Before the introduction of S. 245-A of the old Code corresponding to S. 56 of the present Code women could be arrested in execution of decrees for money.)

#### Note 9

1. See Notes on Clauses.  
2. Case referred by Cantonment Small Cause Court Judge, Meer-Meer, ('71) 1871 Pun Re No. 43.

#### Note 10

1. ('09) 1909 Pun Re No. 16, p. 37.  
(178) 2 Mad 9 (10). (Small Cause debtors also were held entitled to apply under the old Code.)  
(30) AIR 1930 Lah 736 (736). (Omission to note compliance with Section does not indicate that Court failed to inform judgment-debtor.)  
[See ('30) AIR 1930 Cal 555 (556).]  
2. ('10) 1910 Pun W R No. 83, p. 202. (Object of the Section being only to give time to apply.)  
3. ('98) 22 Bom 731 (738).

4. ('11) 9 Ind Cas 121 (121) (Sind).  
5. ('13) 25 Mad L Jour 545 (551).  
6. The application had to be under Ch. XX of the Code which by S. 360 did not apply to the Presidency Towns. Ch. XX was repealed by the Provincial Insolvency Act III of 1907.  
7. For Notifications see Assam Manual of Local Rules and Orders, Edn. 1893, p. 191; Bengal Local Statutory Rules and Orders, Vol. II, p. 70; Bombay List of Local Rules and Orders, Edn. 1896, Vol. I, p. 406; Lower Burma Courts Manual, 1905, para 602, No. 3751, dated 28th September 1877, Judicial Commissioners Civil Circular, 1-43; Madras List of Local Rules and Orders, Edn. 1898, Vol. I, p. 195; N W P and Oudh List of Local Rules and Orders, Edn. 1894, p. 112; Rules and Orders of Civil Court of Punjab, Vol. I, p. 2 (Edn. 2.)

#### Note 11

1. ('85) 8 Mad 508 (504).  
See also O. 21 R. 40.

clear that the surety is not discharged by the mere filing of the insolvency application by the judgment-debtor, but that his liability continues until a final order is made on the petition in insolvency.<sup>2</sup>

The surety will be liable (1) if the judgment-debtor fails to apply in time to be declared an insolvent,<sup>2a</sup> or (2) if he fails to appear whenever called upon to do so.<sup>3</sup>

*Application within one month to be declared an insolvent.*—A surety is not discharged by a petition by the judgment-debtor to be declared an insolvent where it is not in proper form and not within the prescribed time.<sup>4</sup> Where a judgment-debtor presented an insolvency application not in a proper form and not accompanied with the necessary deposit, and the same was returned for amendment but was not re-presented thereafter, the surety was held not discharged from his liability.<sup>5</sup> Where, however, a surety bond is given undertaking that the judgment-debtor would "continue the insolvency proceedings," the liability continues only up to the adjudication. The fact that after adjudication it is annulled for the default of the insolvent will not render the surety liable under the bond.<sup>6</sup> A Court has no jurisdiction to extend the period of one month fixed by the Section. The period being one fixed by law, Section 148 has no application to it.<sup>6</sup>

*Appearance whenever called upon.*—A security bond under this Section is in the nature of a continuing guarantee and the surety is entitled to produce the judgment-debtor before the Court and request it to absolve him from further liability under the bond.<sup>7</sup> But the production of the judgment-debtor at a time when it is impossible for the Court or the decree-holder to take any steps to have the judgment-debtor taken into custody does not amount to his appearance when called upon to appear and the surety will not be discharged thereby.<sup>8</sup> Where the judgment-debtor dies before breach

- (06) 28 All 387 (389). (Execution application against surety after judgment-debtor's application in insolvency is not in accordance with law.) (93) 15 All 188 (184, 185). (The object being only to insure that the judgment-debtor should apply to be declared an insolvent.) (08) 13 Mad 484 (485). (Subsequent withdrawal of insolvency petition did not matter.) (92-96) 1892-96 Upp Bur Rul 269. (94) 1894 Pun Re No. 100. 2. (22) AIR 1922 Bom 340 (340) : 46 Bom 702. 2a. (35) AIR 1935 Lah 918 (918). 3. (37) 1937 Mad W N 1165 (1166). (Bond undertaking that judgment-debtor would be present on specified date and that in default surety would produce him—Failure to produce after specified date when called on by Court—Surety liable.) (36) AIR 1936 Rang 168 (170) : 14 Rang 190. (Meaning of "when called upon to appear"—Service of special notice calling upon debtor to appear on any particular occasion not necessary—It is sufficient if his counsel is informed that his presence would be necessary on next date.) (28) AIR 1928 Lah 974 (975). (Surety undertaking to produce judgment-debtor on date fixed must produce even though decree-holder remains absent.) (27) AIR 1927 Mad 1081 (1081). (10) 12 Cal 1 Jour 419 (422).
- (25) AIR 1925 Lah 170 (171). (Liability of surety not extinguished because judgment-debtor has obtained protection order.) (See also (1900) 1900 All W N 156 (157). (Bond not making sureties liable for performance of the decree but only for production of the judgment-debtor before the Court. Ss. 253 and 386 of the Code of 1882 *held* not applicable.) (10) 1910 Pun L R No. 51. (Where he appears on the due date in obedience to the order of the Court, surety is not liable.) 4. (28) AIR 1928 Sind 192 (192). (See (31) AIR 1931 Bom 444 (446). (Where however all the partitioners required by S. 18 of the Provincial Insolvency Act, were not complied with but application was bona fide, it was held enough to discharge surety.)] 5. (28) AIR 1928 Sind 192 (192). 5a. (33) AIR 1933 Nag 40 (41, 42) : 29 Nag LR 28. (See also (36) AIR 1936 Mad 663 (968, 964).] 6. (26) AIR 1926 Mad 689 (689, 690). (26) AIR 1926 Mad 286 (286). 7. (34) AIR 1934 Lah 962 (962). (29) AIR 1929 Lah 262 (262, 263). 8. (25) AIR 1925 All 344 (345). (Order for stay of execution against judgment-debtor in force—Production of judgment-debtor at that time without notice to decree-holder.) (See also (87) 14 Cal 757 (760). (Voluntary appearance of judgment-debtor for another purpose.)]

of either of the conditions of the bond, the surety is discharged thereby.<sup>9</sup> But where he dies *after* the breach of any one of the conditions, as for instance where he fails to apply within one month and then dies, the liability of the surety continues and he is not discharged.<sup>10</sup>

Under the old Code, the security had to be "that he will appear when called upon" and it was held that this referred to the *particular* execution application in which the judgment-debtor was arrested, so that if that application was dismissed or struck off, the surety was discharged.<sup>11</sup> Under the present Section the security must be "that he will appear, when called upon in *any* proceeding upon the application or upon the decree in execution of which he was arrested." This makes it clear that a surety will not be released by the dismissal of the particular execution application<sup>12</sup> especially where a breach of the conditions of the bond had occurred before the dismissal.<sup>13</sup> But, where, after the execution of the security bond, the judgment-debtor applied to the Debt Conciliation Board to settle his debts including the debt due to the decree-holder and on production of the certificate showing that such application had been made, the execution case was struck off as infructuous and the order was accepted without protest by the decree-holder, it was held that both parties must be considered to have accepted the position that the execution proceedings had come to an end and that the matter would be dealt with, *thereafter*, by the Debt Conciliation Board, i.e., in other words, that the surety bond was regarded as cancelled and it was not thereafter open to the decree-holder, when he had refused to accept the offer made by the judgment-debtor before the Debt Conciliation Board, to ask the Court to realise the security.<sup>13a</sup>

The non-production of the judgment-debtor owing to illness which renders his attendance physically impossible without risk to health or life is a valid excuse and does not render the surety liable on the bond.<sup>14</sup> Nor can he be proceeded against while the proceedings in insolvency filed by the judgment-debtor are pending and there is no other default.<sup>15</sup> See also the undermentioned cases.<sup>15a</sup>

9. (14) AIR 1914 Cal 162 (163) : 41 Cal 50. (Death before occasion to appear in Court arrives.)
- (07) 29 All 466 (468). (Death before order on insolvency application was passed.)
- (01) 24 Mad 637 (639). (Death before expiry of specified time to appear.)
10. (24) AIR 1924 Bom 428 (429) : 48 Bom 500. (The fact that a warrant of arrest was issued against the judgment-debtor at that time makes no difference.)
11. (87) 14 Cal 757 (760, 761). [See also (95) 19 Bom 694 (696). (Question as to discharge of surety's liability left to be decided in separate suit.)]
12. (17) AIR 1917 Mad 237 (239) : (1916) 2 Mad W N 273 (275).
- (32) AIR 1932 Lah 492 (493). (Execution dismissed for default of decree-holder.)
- [See also (35) AIR 1935 Lah 918 (919). (Previous execution proceedings against judgment-debtor consigned to the record room—Surety is not discharged.)]
- (34) AIR 1934 Lah 92 (92). (Surety bond held to be in force only during continuance of execution proceedings in absence of indication to contrary.)
13. (39) AIR 1939 Sind 270 (272) : 1 L R 1939 Kar 401 (405).
- (21) AIR 1921 Pat 72 (73). (Surety accepted liability on judgment-debtor failing to produce the judgment-debtor in Court as stipulated.)

- 13a. (37) AIR 1937 Nag 269 (270).
14. (29) AIR 1929 Lah 479 (480).
- (38) AIR 1938 Mad 530 (531). (But illness which would not render the presence of the judgment-debtor physically impossible will not absolve the surety.)
15. (06) 28 All 387 (389). (Execution application if made against surety is not in accordance with law.)
- 15a. (39) AIR 1939 Sind 270 (271) : 1 L R 1939 Kar 401 (403, 404). (The fact that a judgment-debtor for whose appearance a person has stood surety, if that bond provides that he should appear only when ordered by the Court—Case adjourned from time to time—Order for appearance at adjourned hearing is necessarily implied.)
- (35) AIR 1935 Mad 543 (544). (Surety undertaking to produce judgment-debtor in Court in case latter failed to apply for insolvency and on default to pay the decretal amount—*Held*, surety's liability for the decretal amount did not arise merely on failure of judgment-debtor to apply for insolvency within the stipulated period but such liability would arise only on failure to produce the judgment-debtor in Court as stipulated.)

**15. Damages for wrongful arrest.**—In a suit for damages for wrongful arrest in execution of a decree, the plaintiff must show—

- (a) that the original action out of which the alleged injury arose was decided in his favour,
- (b) that the arrest was procured maliciously and without reasonable and probable cause, and
- (c) that he has suffered some collateral wrong.<sup>1</sup>

**16. Insolvency, when a protection from arrest.**—A judgment-debtor is not protected from arrest by the mere fact of his having *applied* in insolvency whether the debt for which he is sought to be arrested is mentioned in the schedule or not.<sup>1</sup> Even an order of adjudication will not protect the debtor in respect of debts not mentioned in the insolvency petition.<sup>2</sup> In respect of debts scheduled in the insolvency petition, there is, by the mere fact of adjudication, a qualified protection inasmuch as the debtor cannot be proceeded against *without the leave of the Insolvency Court*.<sup>3</sup> Where a *protection order* has been made in favour of the insolvent under Section 31 of the Insolvency Act, the debtor will have an unqualified protection against all proceedings in respect of the scheduled debts.<sup>4</sup>

**17. Application for arrest, if a step-in-aid of execution.**—An application for the arrest of the judgment-debtor will be an application for execution and will give a fresh starting point of limitation under Article 182 of the Limitation Act.<sup>1</sup> An application by the heirs of the decree-holder will also be a step-in-aid of execution within the meaning of the said Article 182 even though the heirs have not obtained a successful certificate and have not been placed on the record.<sup>2</sup>

**18. Appeal and revision from orders under the Section.**—An order against the judgment-debtor or against the surety under this Section is an order falling within Section 47 and is appealable as a decree.<sup>1</sup> So also is an order against a decree-holder refusing simultaneous execution against the person and property of the judgment-debtor.<sup>2</sup>

As mentioned in Note 13, when a condition of the bond is broken, the option of proceeding against the surety or the judgment-debtor lies with the Court. When the Judge exercises the option in favour of the surety, the matter cannot be subsequently re-opened before him. If he does so, and passes fresh orders, they are passed without jurisdiction and can be set aside in revision.<sup>3</sup>

(198) 12 Bom 46 (47, 48).]

#### Note 15

1. (179) 4 Cal 583 (585, 586).

#### Note 16

1. (110) 1910 Pun W R No. 83, p. 202.

(106) 9 Oudh Cas 42 (46).

2. (89) 16 Cal 85 (88).

3. See Section 28 (2) of the Provincial Insolvency Act, V of 1920.

(127) AIR 1927 Mad 919 (920) : 50 Mad 977.

4. See Section 31 of the Provincial Insolvency Act, V of 1920.

#### Note 17

1. See Art. 182 (5) of the Limitation Act.

[See (197) 24 Cal 778 (780, 784). (Even if the application is unsuccessful.)]

2. (193) 20 Cal 755 (757).

(196) 20 Bom 76 (77, 78).

(108) 31 Mad 77 (80).

#### Note 18

1. (195) 1895 Pun Re No. 69. (Order of imprisonment of judgment-debtor.)

(32) AIR 1932 Bom 77 (78). (For appealability of orders against surety, see Section 145, *infra*.)

2. (83) 7 Bom 301 (302).

3. (137) AIR 1937 Pat 476 (477).

**56. [S. 245A.]** Notwithstanding anything in this Part, the Court shall not order the arrest or detention in the civil prison of a woman in execution of a decree for the payment of money.

Prohibition of arrest or detention of women in execution of decree for money.

**1. Scope of Section.**—Before the Code of 1908 was enacted, there was no rule prohibiting the arrest of women in execution of decrees and a purdannahin woman was held not exempt from arrest.<sup>1</sup> Under the present Section a Court cannot arrest a woman in execution of a *money decree*.<sup>2</sup> But, can a woman be arrested in execution of a decree for the restitution of conjugal rights? Under O. 21 R. 33 as it originally stood, such arrest was legal.<sup>3</sup> But after that Rule was amended by Act XXIX of 1923 a decree for the restitution of conjugal rights, whether against the husband or the wife, cannot be executed by the arrest of the judgment-debtor.

Although this Section exempts a woman from arrest in execution of a decree for money, yet where in a suit for money a woman is the plaintiff, she may be required under O. 25 R. 1 (3) to give security for the defendant's costs.

**57. [S. 338.]** The *Provincial Government* may fix scales, graduated according to rank, race and nationality, of monthly allowances payable for the subsistence of judgment-debtors.

[1877, S. 338; See O. 21 R. 39.]

a. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "Local Government."

**58. [Ss. 341, 342.]** (1) Every person detained in the civil prison in execution of a decree shall be so detained,—

(a) where the decree is for the payment of a sum of money exceeding fifty rupees, for a period of six months, and, (b) in any other case for a period of six weeks:

Provided that he shall be released from such detention before the expiration of the said period of six months or six weeks, as the case may be,—

(i) on the amount mentioned in the warrant for his detention being paid to the officer in charge of the civil prison, or

# Section 56 — Note 1

1. (168) 10 Subh W R 21 (26) (F B). (Absolutely.)
2. (122) AIR 1922 Nag 98 (100, 101) : 18 Nag L R 145. (The proposition that no money decree possible which does not carry with it a right to arrest the judgment-debtor is not correct.)
3. See (67) 11 Moo Ind App 551 (609) (F C).

(ii) on the decree against him being otherwise fully satisfied, or (iii) on the request of the person on whose application he has been so detained, or (iv) on the omission by the person, on whose application he has been so detained, to pay subsistence-allowance: Provided, also, that he shall not be released from such detention under clause (ii) or clause (iii), without the order of the Court.

(2) A judgment-debtor released from detention under this section shall not merely by reason of his release be discharged from his debt, but he shall not be liable to be re-arrested under the decree in execution of which he was detained in the civil prison. [1877, Ss. 341 and 342; 1859, S. 278.]

Synopsis

- |   |   |
|---|---|
| 1. Legislative changes.                         | 3. Omission to pay subsistence allowance will result in release of judgment-debtor. |
| 2. "Subsistence allowance."                     | 4. Person released from detention under this Section cannot be re-arrested.         |
| 5. Interim protection order, effect of.         | 5. Omission to pay subsistence allowance will result in release of judgment-debtor. |
| 6. Period of detention.                         | 6. Release does not discharge debtor from debt.                                     |
| 7. Release does not discharge debtor from debt. | 8. Contempt of Court.   |
| 8. Contempt of Court.                           | 9. Application for arrest, if saves limitation.                                     |
| 9. Application for arrest, if saves limitation. | 10. Miscellaneous.  |

1. Legislative changes. — The following are the main changes effected : —  
(1) Clauses (a) and (b) of sub-section (1) correspond to Section 342 of the old Code, but the phraseology has been changed with a view to make it clear that the Court has no power to fix shorter periods than those mentioned in the Section. See Note 6 below.  
(2) The proviso to sub-section (1) and sub-section (2) correspond to Section 341 of the old Code, clauses (a) to (d).

2. "Subsistence allowance." — The cost of clothing, etc., of the judgment-debtor, required to be supplied by the decree-holder under Section 33 of the Prisons Act, is not "subsistence allowance" under Section 58 which includes only the monthly allowance fixed by scale under Section 57 of the Code.<sup>1</sup>

3. Omission to pay subsistence allowance will result in release of judgment-debtor. — On failure of the decree-holder to pay subsistence allowance the judgment-debtor should be released.<sup>1</sup> A payment cannot be considered to have been made to the officer in charge of the prison until it actually reaches his hands. Hence where, though the subsistence allowance has been sent by money-order to such officer

Section 58 — Note 2

1. (12) 17 Ind Cas 911 (911) : 6 Low Bur Rui 61. (Debtor released for non-payment of cost of clothing and bedding can be re-arrested.)  
Bourke O C 59, (Do).  
Bourke O C 51. (Subsistence allowance must be paid in advance.)  
Bourke O C 59, (Do).

sufficiently early to reach him in time, it does not actually reach him in time, there is an "omission to pay" within Section 58 (b) (iv).<sup>2</sup> Where a judgment-debtor is released on the application of the decree-holder the latter is entitled to a refund of the balance of the subsistence money advanced by him that remains in Court at the time of the debtor's release.<sup>3</sup>

**4. Person released from detention under this Section cannot be re-arrested.** — A judgment-debtor released from detention under this Section cannot be re-arrested in execution of the same decree.<sup>1</sup> Hence a judgment-debtor cannot, in execution of an instalment decree, be arrested and imprisoned separately for default in respect of each instalment.<sup>2</sup> But the immunity from re-arrest exists only when the judgment-debtor has been actually *detained in prison*<sup>2a</sup> and not where he has been merely *arrested*. Hence, where after arrest the judgment-debtor is released before *actual imprisonment*, he can be re-arrested in execution of the decree.<sup>3</sup> But where the warrant of commitment to jail has been made out, a discharge of the judgment-debtor whilst in confinement in the court-house is a release from "detention" within the meaning of this Section.<sup>4</sup> Another condition for the applicability of the immunity from re-arrest is that the release from detention must be *under this Section*. Thus, a debtor who has been released owing to a mistake of the jail authorities in sending the demand for clothing under Section 33 of the Prisons Act to a wrong address is not exempt from re-arrest under this Section.<sup>5</sup> See also Note 5. A Court cannot direct the re-arrest of a judgment-debtor without any petition or motion of the decree-holder.<sup>6</sup>

**5. Interim protection order, effect of.** — Where a judgment-debtor who has been arrested and imprisoned in execution of a decree applies to be adjudicated an insolvent and obtains an interim protection order and is released, is he liable to be re-arrested under the decree? On this question there is a conflict of decisions. The High Courts of Allahabad<sup>1</sup> and Bombay<sup>2</sup> take the view that the judgment-debtor is liable to be re-arrested in such a case as, according to them, the only cases in which the judgment-debtor is entitled to exemption from re-arrest are those enumerated in Section 58. But the Calcutta High Court has taken the opposite view and held that once the judgment-debtor is released from imprisonment in execution of a decree he cannot be re-arrested under the same decree.<sup>3</sup> It is submitted that the view taken in Bombay and Allahabad is more in consonance with the language of the Section.

2. (14) AIR 1914 Mad 24 (24). (Consequent release of the debtor is a release under this Section)
  3. (68) 5 Bom H C R A C 84 (85).
- Note 4**
1. (68) 4 Mad H C R 76 (77). (Release for non-payment of subsistence money.)
  - Bourke O G 109. (Do. The decision in (1873) Pun Re No. 87 under the Code of 1859 must be regarded as obsolete.)
  2. (88) 7 Bom 106 (108).
  - 2a. (37) AIR 1987 Lab 258 (254). (Detention in court-house is not detention in civil prison — judgment-debtor can be re-arrested.)
  3. (70) 6 Mad H C R 84 (84). (The Code expressly preserves a distinction between arrest and imprisonment.)
  - (99) 2 UP Bur Rul 281. (Judgment-debtor arrested and released immediately without being imprisoned.)
  - (29) AIR 1929 Lab 361 (362). (Judgment-debtor released while being taken to civil prison.)
1. (11) 38 All 279 (283). (Such release is not discharge under this Section.)
  2. (02) 26 Bom 652 (659). (Release under S. 13, Indian Insolvents' Act.)
  3. (93) 20 Cal 874 (878). (Circumstances under which release is obtained are immaterial.)
- Note 5**
6. (71) 15 Suth W R 68 (68).
  5. (12) 17 Ind Gas 911 (911) : 6 Low Bur Rul 61.
  4. (85) 9 Bom 181 (182).
  - C. P. Code.
  - of his being exempt from arrest under S. 135 and discharged before imprisonment on ground of his being exempt from arrest under S. 135
  - (96) 28 Cal 128 (129). (Judgment-debtor arrested and discharged before imprisonment on ground of his being exempt from arrest under S. 135 money.)
  - (29) AIR 1929 Lab 361 (362).
  - (85) 8 Mad 21 (22). (Discharge before imprisonment on account of non-payment of subsistence to pay subsistence allowance.)
  - (04) 26 All 817 (818). (Judgment-debtor arrested but not imprisoned due to decree-holder's failure to pay subsistence allowance.)



**6. Period of detention.**— Under this Section, the Court has no power at its discretion to fix shorter periods of imprisonment than those prescribed in the Section.<sup>1</sup> Where the defendant is under imprisonment under O. 38 R. 4 of the Code, such imprisonment suffered after the date of the decree must be deemed as imprisonment in execution of the decree and the period of imprisonment after that date must be taken into consideration in calculating the period prescribed by Section 58.<sup>2</sup> Where a judgment-debtor is released, not under this Section, but under a mistake of the jail authorities and he is re-arrested, the period of imprisonment under the new warrant should include the period of imprisonment already suffered under the old warrant.<sup>3</sup>

**7. Release does not discharge debtor from debt.**— A release under this Section does not discharge the debtor from the debt. His property remains liable to attachment and sale<sup>1</sup> and he can also be adjudicated an insolvent for the debt.<sup>2</sup> Under the Agra Tenancy Act,<sup>3</sup> where a judgment-debtor has been released from detention and the amount due under the decree does not exceed Rs. 100, the Court may declare him absolved from liability for payment of money, and such liability shall thereupon be extinguished except in regard to liability to ejectment.

**8. Contempt of Court.**— This Section does not apply to cases of imprisonment for contempt of Court,<sup>1</sup> the power of the Court to imprison for contempt being irrespective of the Code.<sup>2</sup>

**9. Application for arrest, if saves limitation.**— An application for the arrest of a judgment-debtor in contravention of this Section does not give a fresh starting point of limitation.<sup>1</sup>

**10. Miscellaneous.**— A Court will release a debtor where the jailor holds no warrant<sup>1</sup> but not where the warrant is only informal.<sup>2</sup>

A return to a writ of *habeas corpus* must be taken to be true and cannot be controverted by affidavit;<sup>3</sup> but where a debtor who is arrested and imprisoned under a warrant of the Presidency Small Cause Court is brought before the High Court on a writ of *habeas corpus*, he is entitled to show that he was privileged from arrest, the Presidency Small Cause Court not being a Court of co-ordinate jurisdiction with the High Court but subordinate to it.<sup>4</sup> Under the Oudh Rent Act<sup>5</sup> the imprisonment and attachment may, subject to the provisions of this Section, be continued until the party complies with the terms of the decree.

- (96) 12 Cal 652 (657). (Debtor released on bail, in theory, remains in custody under the original warrant.)

**Note 6**

1. ('89) 13 Mad 141 (142).  
 ('02) 5 Cal W N 145 (146).  
 2. ('83) 7 Bom 431 (437).  
 3. ('12) 17 Ind Gas 911 (912) : 6 Low Bur Rul 61.  
 (Demand to pay cost of clothing sent to wrong address—Decree-holder not receiving it in time.)

**Note 7**

1. ('68) 1868 Beng L R Sup 889 (891) (P B).  
 (Debtor released at the request of the creditor.)

2. ('69) 6 Bom H C R O 86 (87).  
 3. Act III of 1926, Schedule II.

**Note 8**

1. ('79) 4 Cal 655 (659).

2. ('83) 7 Bom 5 (12). (Power was vested by Royal Charter in the Supreme Courts and subsequently in the present High Courts.)

**Note 9**

1. ('90) 12 All 64 (65). (Being "not in accordance with law.")

**Note 10**

1. 1 Ind Jur (N S) 19.  
 2. Bourke, O C 96.  
 3. ('70) 5 Beng L R 418 (428). (But may be amended.)

4. ('76) 1 Cal 78 (86). (Arrest by bailiff of Court as soon as debtor left Court premises for going home.)

5. Act XXII of 1886, Section 148 (2).

59. [S. 653.] (1) At any time after a warrant for the

arrest of a judgment-debtor has been issued the Court may cancel it on the ground of his serious illness.

(2) Where a judgment-debtor has been arrested, the Court may release him if, in its opinion, he is not in a fit state of health to be detained in the civil prison.

(3) Where a judgment-debtor has been committed to the civil prison, he may be released therefrom —

(a) by the *Provincial Government*, on the ground of the existence of any infectious or contagious disease, or

(b) by the committing Court, or any Court to which that Court is subordinate, on the ground of his suffering from any serious illness.

(4) A judgment-debtor released under this section may be re-arrested, but the period of his detention in the civil prison shall not in the aggregate exceed that prescribed by section 58.

a. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "Local Government."

Synopsis

- 1. Discretion of Court in issuing warrant.
- 2. On the ground of serious illness.

1. Discretion of Court in issuing warrant. — The provisions of this Section are based on humanitarian grounds and if a judgment-debtor is suffering from serious illness, the Court would be well advised in ordering his release so as to escape from the moral responsibility in case anything should happen to him on being sent to jail. A Court is not bound in every case to issue a warrant for arrest and if it has reason to believe that the judgment-debtor is not in a fit state of health to undergo confinement, it would act wisely in issuing a notice to him to show cause in the first instance.<sup>1a</sup> The discretion exercised in issuing a warrant of arrest will not ordinarily be interfered with in appeal.<sup>2</sup>

2. On the ground of serious illness. — Asthma and indigestion do not constitute "serious illness" sufficient to enable the Court to cancel a warrant of arrest issued against the judgment-debtor.<sup>1</sup>

Section 59 — Note 1

1. ('34) AIR 1934 Lah 807 (808). (The provisions of this Section are also not controlled by sub-sections 3 and 4 of Section 55, ante.)  
2. ('33) AIR 1933 Lah 307 (308). (Unless wrongly exercised.)  
1a. ('11) 9 Ind Cas 746 (747) (Oudh).  
2. ('33) AIR 1933 Lah 307 (308).  
1. ('33) AIR 1933 Lah 307 (308).  
Note 2

## ATTACHMENT

## 60. (1) The following property is liable to attachment and

sale in execution of a decree, namely, lands, houses or other buildings, goods, money, bank-notes, cheques, bills of exchange, hundis, promissory notes, Government securities, bonds or other securities for money, debts, shares in a corporation and, save as hereinafter mentioned, all other saleable property, moveable or immoveable, belonging to the judgment-debtor, or over which, or the profits of which, he has a disposing power which he may exercise for his own benefit, whether the same be held in the name of the judgment-debtor or by another person in trust for him or on his behalf:

Provided that the following particulars shall not be liable to such attachment or sale, namely:—

- (a) the necessary wearing-apparel, cooking vessels, beds and bedding of the judgment-debtor, his wife and children, and such personal ornaments as, in accordance with religious usage, cannot be parted with by any woman; (b) tools of artisans, and, where the judgment-debtor is an agriculturist, his implements of husbandry and such cattle and seed-grain as may, in the opinion of the Court, be necessary to enable him to earn his livelihood as such, and such portion of agricultural produce or of any class of agricultural produce as may have been declared to be free from liability under the provisions of the next following section;
- (c) houses and other buildings (with the materials and the sites thereof and the land immediately appurtenant thereto and necessary for their enjoyment) belonging to an agriculturist and occupied by him;

(d) books of account;

(e) a mere right to sue for damages;

(f) any right of personal service;

(g) stipends and gratuities allowed to pensioners of the Crown, or payable out of any service family pension fund notified in the Official Gazette by the Central Government or the Provincial Government in this behalf, and political pensions;

(h) the wages of labourers and domestic servants, whether payable in money or in kind; and salary, to the extent of the first hundred rupees and one-half the remainder of such salary;

(i) the salary of any public officer or of any servant of a railway company or local authority to the extent of the first hundred rupees and one-half the remainder of such salary:

Provided that, where the whole or any part of the portion of such salary liable to attachment has been under attachment, whether continuously or intermittently for a total period of twenty-four months, such portion shall be exempt from attachment until the expiry of a further period of twelve months and, where such attachment has been made in execution of one and the same decree, shall be finally exempt from attachment in execution of that decree;

(j) the pay and allowances of persons to whom the Indian Army Act, 1911, or the Burma Army Act applies, or of persons other than commissioned officers to whom the Naval Discipline Act as modified by the Indian Navy (Discipline) Act, 1934, applies;

(k) all compulsory deposits and other sums in or derived from any fund to which the Provident Funds Act, 1925, for the time being applies in so far as they are declared by the said Act not to be liable to attachment;

(l) any allowance forming part of the emoluments of any public officer or of any servant of a railway company or local authority which the [appropriate Government] may by notification in the [Official Gazette] declare to be exempt from attachment, and any subsistence grant or allowance made to any such officer or servant while under suspension;

(m) an expectancy of succession by survivorship or other merely contingent or possible right or interest;

(n) a right to future maintenance;

(o) any allowance declared by any Indian law to be

exempt from liability to attachment or sale in execution of a decree; and,

(p) where the judgment-debtor is a person liable for the payment of land-revenue, any moveable property which, under any law for the time being applicable to him, is exempt from sale for the recovery of an arrear of such revenue.

**Explanation 1.**—The particulars mentioned in clauses (g), (h), (i), (j), (l) and (o) are exempt from attachment or sale whether before or after they are actually payable, [and in the case of salary other than salary of a public officer or a servant of a railway company or local authority the attachable portion thereof is exempt from attachment until it is actually payable.]

**Explanation 2.**—In clauses (h) and (i), “salary” means the total monthly emoluments, excluding any allowance declared exempt from attachment under the provisions of clause (l), derived by a person from his employment whether on duty or on leave.

**Explanation 3.**—In clause (l) “appropriate Government” means —

(i) as respects any public officer in the service of the Central Government, or any servant of a Federal Railway or of a cantonment authority or of the port authority of a major port, the Central Government;

(ii) as respects any public officer employed in connexion with the exercise of the functions of the Crown in its relations with Indian States, the Crown Representative; and

(iii) as respects any other public officer or a servant of any other railway or local authority, the Provincial Government.

(2) Nothing in this Section shall be deemed —

to exempt houses and other buildings (with the materials and the sites thereof and the lands immediately appurtenant thereto and necessary for their enjoyment) from attachment or sale in execution of decrees for rent of any such house, building, site or land.

a. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for “pensioners of the Government.”

b. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "Gazette of India."  
 c. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "the Governor-General in Council."  
 d. Clauses (i) and (j) substituted by the Code of Civil Procedure (Second Amendment) Act, 1937 (IX of 1937), Section 2, for the original clauses (i) and (j).  
 e. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "Indian Articles of War apply."  
 f. Inserted by the Amending Act, 1934 (XXXV of 1934), Section 2 and Schedule.  
 g. Substituted by the Code of Civil Procedure (Second Amendment) Act, 1937 (IX of 1937), Section 2, for "1897."  
 h. Clause (2) substituted by the Code of Civil Procedure (Second Amendment) Act, 1937 (IX of 1937), Section 2, for "1897."  
 i. Words "appropriate Government" substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "Governor-General in Council."  
 j. Words "Official Gazette" substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "Gazette of India."  
 k. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for "any law passed under the Indian Councils Acts 1861, and 1892."  
 l. The original Explanation was re-numbered Explanation 1 by the Code of Civil Procedure (Second Amendment) Act, 1937 (IX of 1937), Section 2 and words within square brackets inserted by *ibid*.  
 m. Explanation 2 inserted by Section 2 *ibid*.  
 n. Explanation 3 inserted by the Government of India (Adaptation of Indian Laws) Order, 1937.

## Synopsis

15. Wages of labourers, etc., and salaries of private employees—Clause (h).
16. Salary of public officers, etc. — Clause (i).
- 16a. Salary of private servants. See Notes 15 and 16.
17. Salary of Army Officers.
18. Pay of persons to whom the Indian Army Act, 1911, etc., apply—Clause (f).
19. Compulsory deposits, etc.—Clause (k).
20. Allowances of public officers, etc. — Clause (l).
21. Mere expectancy or other contingent or possible right — Clause (m).
22. Right of future maintenance—Cl. (n).
- 22a. Moveable property exempt from sale for arrears of land revenue—Clause (p).
- 22b. Explanation II—Salary, meaning of.
23. Objection to attachment.

## Other Topics (Miscellaneous)

- Ornaments. See Note 8.
- Political Pensions. See Note 14 Pts. (8) to (22).
- Private Pensions. See Note 14 Pts. (23) to (25).
- Profits of property. See Note 7 Pt. (7) and Note 12 Pt. (5).
- Restraint upon anticipation. See Note 6 Pt. (8) and Note 5 P-N (5).
- Right of residence. See Note 5 Pt. (19).
- Salary of private servants. See Note 16 Pt. (4).
- Security for performance. See Note 7 Pt. (18).
- Service of a public nature. See Note 5.
- Soap making. See Note 9 P-N (2).
- Stipends out of service family fund. See Note 14.
- Trustee of a charity. See Note 5 Pt. (13).
- 30PC. 38.

1. Legislative changes.
2. Subsequent amendments.
3. Scope and applicability of the Section.
4. Property, meaning of.
5. "All other saleable property."
6. "Belonging to the judgment-debtor or over which or the profits of which he has a disposing power."
7. Debts.
8. Necessary wearing apparel, etc. — Clause (a).
9. Tools of artisans, implements of husbandry, etc. — Clause (b).
10. Houses, etc., of agriculturists — Clause (c).
11. "Books of account" — Clause (d).
12. Right to sue for damages—Clause (e).
13. Right of personal service — Clause (f).
14. Stipends and gratuities allowed to pensioners — Clause (g).

- Auctioneer. See Note 6 pt. (12).
- Bonus by Railway Company. See Note 6 Pt. (5) and Note 19 Pt. (2).
- Burmese marriage property. See Note 5 Pt. (3) and Note 6 P-N (13).
- Cooking Vessels. See Note 8 Pt. (4).
- Delivery to post office. See Note 19 Pt. (6).
- In execution of a decree. See Note 3 Pts. (2), (3).
- Land assigned for maintenance. See Note 21 Pt. (7); Note 22 Pts. (4) and (5).
- Life interest. See Note 6 Pt. (4).
- Life-policy. See Note 6 Pts. (8) and (9).
- Non-transferable office. See Note 5 Pts. (8) and (9) and Note 13.

decree," is sold to or taken possession of by the *decree-holder*, the proper remedy for the judgment-debtor to recover the whole or the excess land is by an *application* under this Section and not by a separate *suit*, as the matter is one in execution between the parties to the suit. Where, however, such possession is taken by the decree-holder, not through the officer of the Court but by his *own act*, the judgment-debtor is not barred by Section 47 from bringing a suit to recover land thus wrongly taken as the possession could not be said to have been taken in *execution* of a decree.<sup>3</sup> Similarly, where monies are improperly realised by a *third party* in defiance of an order of injunction, the question is not one between the parties and is not within the Section.<sup>4</sup> But monies unduly or wrongly realised by the decree-holder as due under a decree,<sup>5</sup> or surplus sale-proceeds or jewels wrongly seized,<sup>6</sup> or moveables misappropriated,<sup>7</sup> are recoverable only under this Section and not by a separate suit. Similarly, where the decree-holder, who has realised smaller sums in full satisfaction owing to mistake or the misrepresentation of the judgment-debtor, wants to claim the balance, the question as to the deficient execution is one relating to the execution of the decree, and a separate suit in respect thereof is barred.<sup>8</sup>

**36. Question of damages for acts done under cover of execution.**—Where damages result from acts done under cover of execution proceedings, a separate suit for the recovery of such damages lies. The question is not one relating to the execution, discharge or satisfaction of the decree itself but is one outside the decree.<sup>1</sup>

- (08) 12 Cal W N 1027 (1028).  
 (95) 22 Cal 488 (485).  
 (74) 22 Subh W R 435 (435).  
 (28) AIR 1928 Lah 936 (937).  
 (26) AIR 1926 Mad 968 (969).  
 (70) 5 Mad H C R 185 (189).  
 (38) AIR 1936 Nag 193 (194).  
 (24) AIR 1924 Nag 246 (247) : 20 Nag L R 90.  
 (24) AIR 1924 Nag 122 (123).  
 (04) 7 Oudh Cas 213 (215).  
 (19) AIR 1919 Pat 141 (142).  
 (99) 2 Upp Bur Rui 249.  
 (25) AIR 1925 Sind 126 (126) : 19 Sind L R 302.  
 [But see (23) AIR 1923 All 470 (471) : 45 All 916.]  
 2. (22) AIR 1922 P C 252 (253) : 48 Ind App 155 : 44 Mad 488 (P C).  
 (25) AIR 1925 All 551 (552).  
 (06) 3 All L Jour 601 (602).  
 (03) 1903 All W N 208 (209) : 26 All 152. (Decree ordering sale of undefined rights and interests—Property sold in execution alleged to be in excess of share of judgment-debtor—Sale not objected to at the time—Suit to recover *held* not maintainable.)  
 (07) 6 Cal L Jour 257 (259).  
 (70) 14 Subh W R 39 (40).  
 (30) AIR 1930 Mad 12 (13).  
 (19) AIR 1919 Mad 269 (271) : 42 Mad 753.  
 (12) 13 Ind Cas 133 (134) (Mad).  
 (38) AIR 1938 Nag 276 (281).  
 (28) AIR 1928 Rang 215 (217).  
 [But see (02) 1902 All W N 144 (145) : 24 All 519.  
 (30) AIR 1930 All 865 (866). (But where he has an opportunity to appear and raise the question but does not do so, he cannot afterwards raise the question either under S. 47 or by a suit.)  
 (29) AIR 1929 Lah 121 (122). (Question between auction-purchaser and judgment-debtor.)  
 (99) 2 Oudh Cas 315 (318).]  
 under S. 47.)  
 Malabar Compensation for Tenants; Improve-ments Act makes the question of damages one [But see (18) AIR 1918 Mad 94 (96). (S. 6 of the (08) 31 Mad 37 (39, 40).]  
 (69) 11 Subh W R 516 (516).  
 [See also (06) 28 All 72 (73).  
 1. (07) 6 Cal L Jour 527 (529).  
 Note 36  
 (87) 9 All 229 (231).  
 (82) 6 Bom 148 (150).  
 8. (01) 5 Cal W N 627 (629).  
 7. (16) AIR 1916 Pat 308 (309).  
 (1900) 23 Mad 55 (58).  
 (04) 14 Mad L Jour 295 (296).  
 proceeds since decree was compromised.)  
 (75) 28 Subh W R 207 (207). (Refund of sale- (97) 2 Cal W N 429 (431).  
 6. (22) AIR 1922 Pat 166 (167) : 1 Pat 386.  
 (04) 1904 Pun Re No. 45.  
 (71) 15 Subh W R 160 (161).  
 (78) 4 Cal L Rep 577 (579, 580).  
 (28) AIR 1928 Cal 776 (777).  
 (20) AIR 1920 Bom 208 (209) : 44 Bom 97.  
 (67) 2 Agra 45 (46).  
 (86) 1886 All W N 38 (38).  
 (95) 17 All 478 (481).  
 5. (30) AIR 1930 P C 86 (90) (P C).  
 (05) 27 All 378 (380).  
 4. (05) 27 All 378 (380).  
 [See also (11) 11 Ind Cas 200 (201) (Cal). (Over- payment by judgment-debtor out of Court.)]  
 (25) AIR 1925 Pat 376 (378).  
 (04) 7 Oudh Cas 213 (215).  
 (69) 12 Subh W R 85 (86).  
 3. (73) 12 Beng L R 201 (203).  
 (29) AIR 1929 Pat 391 (392). (Do.)]

not recognised by the executing Court,<sup>8</sup> or for damages for breach of an agreement against execution,<sup>9</sup> or of a contract to enter up satisfaction of the decree.<sup>10</sup>

See O. 21 R. 2 for a full discussion of the whole matter.

**41. Agreement against execution of decree.**—In Note 31 above, agreements against execution entered into *before* the passing of the decree have been dealt with. Where, after the passing of the decree, the parties enter into an agreement against execution of the decree, the question whether such an agreement can be pleaded as a bar to execution depends upon the nature of the agreement and the intention of the parties. If it is clearly the intention of the parties to abandon the decree and to enter into a new and different contract in supersession of the decree, the contract may form the basis of a subsequent suit and the Section is no bar.<sup>1</sup> Where, however, the agreement does not so supersede the decree but is merely pleaded as a bar to execution, the executing Court can inquire into and decide the matter under the Section,<sup>2</sup> subject to the provisions of O. 21 R. 2, where such an agreement amounts to an *adjustment* of the decree.<sup>3</sup> In *Oudh Commercial Bank Ltd. v. Bind Bansi Kuer*,<sup>4</sup> their Lordships of the Privy Council observed as follows :

“ If it appears to the Court acting under Section 47 that the true effect of the agreement was to discharge the decree forthwith in consideration of certain promises by the debtor, then no doubt the Court will not have occasion to enforce the agreement in execution proceedings, but will leave the creditor to bring a separate suit upon the contract. If, on the other hand, the agreement is intended to govern the liability of the debtor under the decree and to have effect upon the time or manner of its enforcement, it is a matter to be dealt with under Section 47. In such a case, to say that the creditor may, perhaps, have a separate suit, is to misread the Code, which, by requiring all such matters to be dealt with in execution discloses a broader view of the scope and functions of an executing Court.”

8. (13) 19 Ind Cas 622 (623) : 35 All 243.

(33) AIR 1933 Pesh 53 (55).  
(37) AIR 1937 P O 256 (259) : 64 Ind App 302 : 1 L R (1938) 1 Cal 66 : 31 Sind L R 637 (PC).  
(AIR 1935 Cal 596 Reversed).  
(96) 19 Bom 546 (549).  
(93) 1903 Pun Re No. 98.  
(85) 1885 Pun Re No. 51.  
(704) 14 Mad L Jour 359 (366, 367). (Agreement securing some additional benefit.)  
[See (33) AIR 1933 Mad 838 (839).]  
2. (84) 6 All 228 (230).  
(84) 6 All 16 (17). (Agreement to give time.)  
(13) 20 Ind Cas 874 (875, 876) (Cal). (Do.)  
(35) AIR 1935 All 364 (365).  
(82) 4 All 240 (242).  
(12) 13 Ind Cas 204 (205) (Mad).  
(82) 8 Mad L Jour 193 (194). (Agreement by decree-holder auction-purchaser not to take delivery of possession for consideration—Agreement held could be set up in execution.)  
[See (37) AIR 1937 Pat 672 (672). (Under the peculiar terms of the compromise (postponing date of completion of sale under mortgage decree), held, executing Court had no option but to contract sale on the date mentioned and had no power to compel the parties to comply with the terms of the compromise.)]  
3. (18) 20 Ind Cas 874 (876) (Cal).  
4. (39) AIR 1939 PC 80 (86) : 14 Luck 192 : 1 L R (1939) Kar 136 (PC). (AIR 1932 All 273 approved.)

## Note 41

8. (13) 19 Ind Cas 622 (623) : 35 All 243.  
(08) 30 All 464 (466).  
(81) 3 All 538 (540).  
(81) 3 All 538 (535).  
(23) AIR 1923 Bom 258 (253).  
(79) 4 Bom 295 (297).  
(98) 25 Cal 718 (723, 724).  
(79) 3 Cal L Rep 414 (416).  
(70) 18 Suth W R 69 (73, 74) (FB).  
(77) 1877 Pun Re No. 66.  
(98) 21 Mad 409 (410).  
(85) 8 Mad 277 (283).  
(83) 6 Mad 41 (43).  
(77) 1 Mad 208 (204).  
(29) AIR 1929 Rang 269 (270) : 7 Rang 310.  
(13) 22 Ind Cas 963 (964) : 1 Upp Bur Rul 191.  
[See also (38) AIR 1938 Pesh 12 (14). (Objection that debt had been satisfied and final decree on mortgage should not be passed—Objection overruled and final decree passed—Suit for recovery for money paid is maintainable.)]  
9. (12) 13 Ind Cas 944 (945) (Cal).  
(84) 10 Cal 354 (356, 357).  
(99) 23 Bom 394 (396, 397).  
(39) AIR 1939 Mad 499 (500).  
(14) AIR 1914 Mad 640 (640).  
(82) 5 Mad 397 (400).  
10. (18) AIR 1918 Mad 720 (721).  
(23) AIR 1923 Rang 88 (89-90) : 11 Low Bur Rul 429.  
1. (81) 3 All 781 (786).



**42. Contribution among judgment-debtors.**—Where one of two or more judgment-debtors purchases the decree in full<sup>1</sup> or in part,<sup>2</sup> or is compelled to pay the whole of the decree amount himself in execution,<sup>3</sup> a suit by such judgment-debtor against others for contribution and recovery of his share of the common debt is not barred, as such a question cannot be said to relate to matters in execution, discharge, or satisfaction of the decree between the parties to the suit within the meaning of the Section. As regards the general right to sue for contribution of costs paid under a decree, see Note 34 to Section 35 *ante*.

**43. Maladministration of estate of deceased judgment-debtor.**—Where a decree-holder, unable to realise the decree amount out of the estate of a deceased judgment-debtor, raises a question as to the *maladministration* of the estate by the executors, the matter is one which involves a much wider question than one merely relating to the execution of the decree and cannot be decided under this Section. A suit will, therefore, lie against the executors for the administration of the estate and for an account on the footing of maladministration.<sup>1</sup>

**44. Stay of execution.**—Under the old Code, there was a difference of opinion as to whether a question of *stay* of execution of a decree is one relating to the execution of the decree, one group of cases holding that it is,<sup>1</sup> and another, that it is not.<sup>2</sup> In order to remove this conflict, the words "or to the stay of execution thereof" were inserted in clause (c) of Section 244 by Act VII of 1888, after which the trend of decisions was uniform in holding that such questions are within the Section.<sup>3</sup> The words "or to the stay of execution thereof" were, however, omitted from Section 47 of this Code and the omission has again created a conflict of views in the various High Courts. Three such different views, at least, have been expressed—

(1) That the question of stay of execution is clearly a matter *relating to the execution* of the decree and that the decision on such a question is a *decree* and is therefore appealable.<sup>4</sup>

(2) That such a question is one relating to execution but that the decision thereon cannot be said to be one "on the rights of the parties" and consequently cannot amount to a *decree* and is therefore not appealable.<sup>5</sup>

**Note 42**

1. ('68) 9 South W R 280 (234).

2. ('88) 15 Cal 187 (198, 194).

3. ('96) 18 All 106 (107).

(198) 21 Mad 45 (46). (Contribution for costs of execution paid.)

**Note 43**

1. ('08) 35 Cal 1100 (1108). (24 Cal 478 explained.)

**Note 44**

1. ('84) 7 All 73 (78).

(188) 12 Bom 279 (280).

(188) 12 Bom 80 (81).

(186) 13 Cal 111 (112).

(186) 12 Cal 624 (625).

(181) 7 Cal 733 (735).

2. ('83) 9 Cal 214 (215).

(105) 29 Bom 71 (73). (12 Bom 279 doubted.)

3. ('98) 22 Bom 463 (472).

(104) 31 Cal 373 (375, 376).

(101) 28 Cal 734 (735, 736).

(1900) 23 Mad 568 (570).

(108) 2 Sind L R 24 (25).

(188) 10 All 389 (394). (Following 7 All 73.)

**Note 42**

4. (30) AIR 1930 Lah 187 (190) : 11 Lah 402.

(27) AIR 1927 Lah 915 (915).

(25) AIR 1925 Lah 69 (69).

(24) AIR 1924 Lah 671 (672).

(24) AIR 1924 Lah 631 (631).

(24) AIR 1924 Lah 602 (603).

(23) AIR 1923 Lah 514 (515).

(22) AIR 1922 Lah 480 (480).

(20) AIR 1920 Low Bur 138 (139) : 10 Low Bur Rul 326.

5. ('31) AIR 1931 All 129 (130, 131). (Following AIR 1929 All 85; AIR 1924 All 808.)

(33) AIR 1933 Nag 84 (85) : 29 Nag L R 121.

(29) AIR 1929 All 85 (85).

(24) AIR 1924 All 808 (808, 809, 811) : 46 All 733.

(15) AIR 1915 Cal 122 (124). (Order refusing to stay execution is not an order under S. 47 which has the characteristics of a decree under S. 2.)

(14) AIR 1914 Cal 149 (149) : 20 Ind Cas 72 (72) : 41 Cal 160.

(11) 12 Ind Cas 745 (748, 750) (Cal).

(28) 106 Ind Cas 890 (891) (Lah). (Order for security to stay execution.)

(3) The question does not relate to execution at all within the meaning of this Section.<sup>6</sup>

The first two views proceed on the assumption that omission of the words in Section 47 by the Legislature was by reason of their being considered superfluous and a surplusage.<sup>7</sup> The last view proceeds on the assumption that the omission was deliberate and intended to show that they should not be considered to be within the Section. It is submitted with respect that the last view is not correct. Reference to the history of the enactment is not a legitimate method of interpreting a Section where there is no ambiguity of any kind and there is nothing in the language of the Section itself that a stay of execution is not a matter relating to execution.

It has been held by the High Court of Madras that it is only where the order in question as to stay of execution is passed by the Court *executing the decree* that the matter will come under Section 47. An order for stay by the Appellate Court in an appeal from the decree is not one within Section 47.<sup>8</sup>

**45. Question of liability of certain property to attachment and sale.**—All objections to attachment and sale in execution of a decree raised *between parties* to the suit or their representatives on the ground that the properties are *not liable to be attached*,<sup>1</sup> or are *not saleable* in execution of that decree,<sup>2</sup> are matters coming

- (118) AIR 1918 Mad 1174 (1177) : 40 Mad 233.  
(Per Abdul Rahim Offg. C. J., Phillips J. Contra.)  
(117) AIR 1917 Mad 810 (311) : 39 Mad 541 (F.B.).  
(116) AIR 1936 Oudh 369 (370).  
(125) AIR 1925 Rang 225 (225) : 3 Rang 255.  
(Order relating to sufficiency of security held not appealable.)  
[See also] (126) AIR 1926 Cal 880 (880).  
(128) 106 Ind Cas 866 (866, 867) (Lab.).  
(124) AIR 1924 All 794 (795).  
(133) AIR 1933 Nag 84 (85) : 29 Nag L R 121.  
(121) AIR 1921 Bom 208 (208) : 45 Bom 241.  
(120) AIR 1920 Cal 71 (72).  
(127) AIR 1927 Lab 235 (235).  
(122) AIR 1922 Lab 400 (400).  
(138) AIR 1938 Rang 317 (317, 318) : 1938 Rang L R 580.  
(31) AIR 1931 Rang 221 (222) : 9 Rang 354.  
(17) AIR 1917 Mad 310 (311) : 39 Mad 541.  
(15) AIR 1915 Mad 41 (41).

#### Note 45

1. (25) AIR 1925 All 594 (595).  
(34) AIR 1934 Pat 281 (282).  
(35) AIR 1935 All 364 (366).  
(38) AIR 1938 Cal 162 (168).  
(38) AIR 1938 Cal 118 (114) : L R (1938) 1 Cal 280.  
(28) AIR 1928 Cal 94 (95, 96) : 54 Cal 1064.  
(27) AIR 1927 Cal 106 (108) : 53 Cal 837.  
(23) AIR 1928 Cal 344 (344).  
(21) AIR 1921 Cal 242 (244).  
(39) AIR 1939 Lab 256 (257).  
(35) AIR 1935 Lab 942 (943).  
(30) AIR 1930 Lab 628 (628). (Objection that the land of judgment-debtor could not be attached as he was agriculturist—On an adverse decision the judgment-debtor filed a separate suit for this purpose—It was dismissed.)  
(09) 4 Ind Cas 121 (122) (Cal).  
(10) 7 Ind Cas 48 (48) (Cal).  
(11) 10 Ind Cas 417 (420) (Cal). (Do.) holding.  
(17) AIR 1917 Cal 672 (672). (Sale of occupancy Section 266 of the old Code.)  
(91) 1891 Bom F J 207. (Not saleable under (95) 19 Bom 328 (331). (Service vatan.)  
(31) AIR 1931 Bom 446 (447). (Not saleable under Section 60, C. P. Code.)  
(85) 7 All 641 (643).  
(84) 6 All 393 (395). (Do.)  
(84) 6 All 448 (449). (Do.)  
Section 9 of the U. P. Rent Act.  
(86) 8 All 146 (147, 148) (F.B.). (Not saleable under Section 245 of the old Code.)  
(88) 1888 All W N 155 (155). (Not saleable under rights.)  
(18) AIR 1918 All 278 (279). (Bx-proprietary Section 20, Agra Tenancy Act.)  
(21) AIR 1921 All 118 (119) : 43 All 547 (F.B.). (Sale of occupancy holding—Objection based on (35) AIR 1935 All 588 (589).  
(35) AIR 1935 All 678 (682) : 58 All 98.  
(35) AIR 1935 All 1016 (1017) : 58 All 360.  
(27) AIR 1927 All 574 (575).  
2. (27) AIR 1927 All 574 (575).  
Court.]  
tion of truth of debt attached not for executing  
[But see] (32) AIR 1932 Mad 169 (169). (Ques-  
[See also] (09) 2 Ind Cas 105 (106) (All).]  
suit is dismissed is party.)  
(36) AIR 1936 Pat 268 (270). (Person against whom (38) AIR 1938 Pat 216 (220).  
(39) AIR 1939 Nag 183 (184, 186).  
ings.)  
attachment must be raised in execution proceed-  
(12) 17 Ind Cas 126 (126) (Mad). (Objections to (32) AIR 1932 Mad 86 (89) : 55 Mad 495.  
(34) AIR 1934 Mad 435 (435) : 57 Mad 822.  
(29) AIR 1929 Lab 778 (779).

within the Section<sup>22</sup> and a separate *suit* in respect thereof will be barred. But such an objection preferred by a *third party* does not come within this Section<sup>26</sup> and a separate *suit* by him in respect thereof will not be barred.<sup>3</sup> A person against whom a *suit* has been dismissed is a party to the *suit* within the meaning of this Section and hence, an objection by such person will be covered by this Section.<sup>3a</sup> An objection raised by a judgment-debtor not in his private capacity but in a representative capacity as shewait of an idol on the ground of the property belonging to the idol, will be one by a stranger and not by a party to the *suit* and as such will not be covered by this Section.<sup>4</sup> As to whether an order on such objection by a party, and therefore coming under the Section, is *appealable* as a decree, see Note 84 *infra*.

Where a puisne mortgagee who is impleaded as a party to a *suit* on a prior mortgage objects to the sale of the mortgaged property on the ground that it belongs to him, his objection being one which attacks the decree itself, does not relate to the execution, discharge or satisfaction of the decree and hence is not covered by this Section.<sup>5</sup> But an objection by him that the sale should not be unconditional so as to conclude his rights can be entertained by the executing Court under this Section.<sup>6</sup>

See also Notes 1 and 24 to O. 21 R. 58 *infra*.

#### 46. Question, if property attached belongs to judgment-debtor. — Where,

in execution of a *money decree*, properties in the hands of the legal representative of the debtor are attached, and the representative objects to the attachment on the

- (05) 9 Cal W N 972 (972). (Judgment-debtor having no saleable interest in the property.)  
 (1900) 27 Cal 415 (416) (FB). (Sale of occupancy holding.)  
 (1900) 27 Cal 187 (189). (Do.)  
 (99) 26 Cal 727 (731). (Do. 8 All 146 Followed.)  
 (89) 16 Cal 608 (606).  
 (99) AIR 1939 Lab 113 (114, 115, 116) : 1 L R (1939) Lab 103.  
 (91) AIR 1931 Lab 141 (142). (Order refusing to sell agricultural land but ordering temporary alienation.)  
 (30) AIR 1930 Lab 628 (628). (Debtor an agriculturist.)  
 (16) AIR 1916 Mad 727 (727).  
 (93) 16 Mad 447 (449). (If the proceeding sought to be set aside relates to the execution and the consent is between the parties to the *suit* the specific ground on which the proceeding is impeached is not material within the meaning of S. 244 (now S. 47).)  
 (98) AIR 1938 Nag 558 (559).  
 (95) AIR 1935 Nag 80 (31, 32) : 31 Nag L R 217.  
 (31) AIR 1931 Oudh 45 (49) : 6 Luck 452. (Pro-  
 perty claimed as waft.)  
 (30) AIR 1930 Oudh 256 (258). (Want of sanction under S. 20 of the Oudh Laws Act.)  
 (25) AIR 1925 Oudh 618 (619) : 28 Oudh Cas 175. (Judgment-debtor having no saleable interest in the property. 8 All 146, Followed.)  
 2a. (97) AIR 1937 Pat 562 (563). (Purchaser of non-transferable holding disposed of in execution of rent decree against transferor can apply under S. 47.)  
 (29) AIR 1929 Pat 472 (472). (A defendant against whom a *suit* is dismissed is nevertheless party to the *suit*.)
- (29) AIR 1929 Pat 141 (144) : 8 Pat 717.  
 (36) AIR 1936 Pat 256 (257).  
 [See also (96) AIR 1936 Mad 733 (744, 745). (Party impleaded in *suit* in one capacity and objecting in execution proceedings in another capacity—Objection is not one within this Section.)]  
 [But see (39) AIR 1939 Sind 22 (23). (Judgment-debtor contending that properties held by him are waft properties—S. 47 applies.)]  
 (36) AIR 1936 Pat 552 (553).  
 (36) AIR 1936 Pat 552 (553).  
 (96) AIR 1936 Pat 552 (553).

ground that the property is *his own* and not that of the debtor,<sup>1</sup> or that he has a charge or lien thereon,<sup>2</sup> the question is one in execution of the decree between a party and a representative of the opposite party and is within the Section. Similarly, where a person is sued as the legal representative of a deceased person, an objection raised by such legal representative on the ground that the property attached belongs to him and not to the deceased, will come within this Section as raising a question between *the parties* to the suit.<sup>2a</sup> But, where he objects, not on his own behalf, but *as representing third parties, or as trustee*,<sup>3</sup> the objection is really one by such third parties and falls under O. 21 R. 58 and not under this Section.

#### Note 46

1. (129) AIR 1929 All 602 (603) : 51 All 878.
- (134) AIR 1934 Mad 621 (622).
- (137) AIR 1937 All 97 (98).
- (135) AIR 1935 All 183 (184).
- (128) AIR 1928 All 704 (705).
- (123) AIR 1923 All 115 (116).
- (117) AIR 1917 All 460 (461) : 39 All 47. (17 Cal 711, Followed.)
- (109) 3 Ind Cas 495 (496) (All).
- (106) 28 All 51 (53, 54).
- (103) 21 All 323 (328).
- (101) 1899 All W N 24 (24).
- (100) 12 All 313 (321, 324, 327) (FB).
- (100) 12 All 73 (78).
- (87) 9 All 605 (608).
- (85) 7 All 733 (734).
- (85) 7 All 547 (549, 550).
- (82) 4 All 190 (192).
- (84) AIR 1934 Bom 296 (297) : 58 Bom 518.
- (28) AIR 1928 Bom 534 (536) : 53 Bom 46.
- (107) 7 Ind Cas 457 (458, 459) : 34 Bom 546.
- (104) 6 Bom L R 697 (699).
- (96) 1896 Bom F J 847 (847).
- (85) 9 Bom 458 (460).
- (85) AIR 1935 Cal 14 (14).
- (34) AIR 1934 Cal 258 (259).
- (28) 115 Ind Cas 353 (353) (Cal).
- (21) AIR 1921 Cal 242 (244).
- (16) AIR 1916 Cal 814 (814). (Following 17 Cal 711.)
- (15) AIR 1915 Cal 275 (276). (Do.)
- (12) 16 Ind Cas 385 (386) (Cal) (Do).
- (12) 16 Ind Cas 255 (255) (Cal). (Decree against the L. R.)
- (1900) 27 Cal 34 (36).
- (90) 17 Cal 711 (714, 718, 721) (F B).
- (89) 16 Cal 1 (7, 8).
- (73) 20 Beng L R 65 (71).
- (73) 20 Subh W R 162 (162).
- (71) 15 Subh W R 163 (164).
- (30) AIR 1930 Lah 1068 (1070). (Decree against mortgagor's legal representative claiming independent interest and objecting to sale of that interest — To be decided in execution.)
- (27) AIR 1927 Lah 895 (896).
- (21) AIR 1921 Lah 173 (175).
- (87) 1887 Pun Re No. 47.
- (37) AIR 1937 Mad 108 (108).
- (35) AIR 1935 Mad 923 (925).
- (33) 26 Mad 501 (502).
- (94) 17 Mad 399 (400). (Objection to sale.)
- (83) 7 Mad 255 (257, 258).
- (82) 5 Mad 391 (393, 394).
- (39) AIR 1939 Nag 147 (149) : I.L.R. (1939) Nag 165.
- (131) AIR 1931 Nag 27 (28). (Objection to sale.)
- (26) AIR 1926 Nag 476 (480).
- (193) 6 C P L R 4 (5).
- (133) AIR 1933 Oudh 473 (474). (If legal representative proves his possession the onus is on the decree-holder to prove that the property belongs to debtor.)
- (29) AIR 1929 Oudh 21 (21).
- (105) 8 Oudh Cas 405 (408).
- (98) Oudh Cas Sup Vol 60 (65). (S. 244 (now S. 47 C. P. C.) makes no distinction between representatives brought on record before and representatives brought on record after the decree.)
- (34) AIR 1934 Pat 188 (190).
- (22) AIR 1922 Pat 572 (573).
- (37) AIR 1937 Pesh 82 (83). (Objection in such a case can be raised even after sale.)
- (34) AIR 1934 Rang 127 (128).
- (28) AIR 1928 Rang 29 (30) : 5 Rang 659.
- (27) AIR 1927 Rang 273 (274) : 5 Rang 393.
- (24) AIR 1924 Rang 323 (325, 326) : 2 Rang 168.
- (31) AIR 1931 Sind 84 (87) : 25 Sind L R 374.
- (35) 47 and 53 can be extended even to property which comes into legal representative's hand by partition before judgment-debtor's death.)
- [See also (86) 1886 Bom F J 250 (251).
- (19) AIR 1919 Cal 623 (624). (A separate suit by L. R. to set aside sale does not lie — Objection ought to have been taken under Section 47. Objection that the property belonged to L. R. and not to the deceased judgment-debtor hence not liable to be sold.)
- [But see (39) AIR 1939 Pat 354 (355, 356).
- (25) AIR 1925 Sind 156 (158).]
2. (129) AIR 1929 Lah 762 (763). (Sec. 47 is not restricted to money decrees but covers all decrees.)
- (103) 2 Ind Cas 432 (432) (Mad).
- (103) 1903 Pun L R No. 20. (Lien.)
- 2a. (39) AIR 1939 Lah 256 (257).
- (38) AIR 1938 Mad 731 (733) : I.L.R. (1938) Mad 1080.
- (34) AIR 1934 Mad 621 (622).
- (34) AIR 1934 Rang 127 (128).
3. (16) AIR 1916 Mad 769 (769).
- (88) 15 Cal 437 (445).
- (28) AIR 1928 All 392 (393) : 50 All 801.
- (24) AIR 1924 All 183 (184). (As mutawalli of wakf.)
- (106) 28 All 644 (646).
- (106) 1906 All W N 157 (157, 158).
- (106) 3 All L Jour 370 (371).
- (85) 7 All 36 (37). (Objection as a wakf.)

Where, in execution of a mortgage decree, the mortgaged properties are brought to sale, and the legal representative of the judgment-debtor or that it could not have been validly mortgaged by him, the objection is really one which *attaches the decree itself* which directs the sale of the properties. Such an objection, therefore, cannot be gone into by the executing Court, but should be raised in a separate suit.<sup>4</sup> But, where in execution of a mortgage decree, properties *not mortgaged* are brought to sale as part of the mortgaged properties, the objection of the legal representative that such properties are his own properties will fall under this Section.<sup>5</sup>

**47. Question, if debts were contracted without legal necessity or tainted with immorality or that the attached property is self-acquired or ancestral.**—The question of the liability of a Hindu son for a debt contracted by the father and its binding nature upon him, the liability of the property of the father in the hands of the son,<sup>7</sup> and the question as to whether the debt was contracted without legal necessity,<sup>8</sup> are questions relating to the execution of the decree and must be determined under this Section. Similarly, the objection to the execution of the decree that the debts are tainted with immorality or illegality can be gone into in execution proceedings under this Section.<sup>9</sup> The question whether the property is ancestral or self-acquired in the hands of the sons to satisfy their father's debts is again one

- (180) 2 All 752 (1953).  
 (198) 23 Bom 237 (242, 243).  
 (115) AIR 1915 Cal 327 (331) : 42 Cal 440. (As a shabait of an idol.)  
 (13) 20 Ind Cas 790 (791, 792) (Cal). (Do.)  
 (11) 12 Ind Cas 163 (164) : 39 Cal 298.  
 (08) 12 Cal W N 308 (309).  
 (07) 11 Cal W N 145 (147).  
 (02) 6 Cal W N 663 (667). (A separate suit by a shabait to set aside the sale of debutter property was held maintainable.)  
 (02) 6 Cal W N 63 (64, 65).  
 (90) 17 Cal 57 (65). (As a shabait of an idol.)  
 (87) 1887 Pun Re No. 12.  
 (18) AIR 1918 Mad 1140 (1140).  
 (08) 31 Mad 125 (126). (Objection as a trustee.)  
 (1900) 23 Mad 195 (202) (F B). (Do.)  
 (39) AIR 1939 Nag 183 (185).  
 (30) AIR 1930 Nag 298 (294) : 27 Nag L R 10.  
 (11) 12 Ind Cas 411 (411) (Oudh). (Objection as a trustee of the property for religious purposes.)  
 (22) AIR 1922 Pat 196 (196) : 1 Pat 637.  
 [But see (89) 1889 Pun Re No. 9. (The question whether the attached property is of the judgment-debtor is one relating to execution.)  
 (27) AIR 1927 Oudh 120 (120, 122) : 2 Luck 145.]  
 4. (99) 12 C P L R 73 (77).  
 (32) 55 Cal L Jour 114 (119). (Sons of mortgagor also implicated in suit—Decree—Saleability of property in decree cannot be questioned in execution.)  
 (32) AIR 1932 All 49 (50). (Mortgagor's L. R. pleading rights under a paramount title acquired before final decree but not provided for therein cannot be raised in execution.)  
 (12) 14 Ind Cas 7 (8) (Cal).  
 [See also (34) AIR 1934 Cal 118 (119).]

# Note 47

- (93) AIR 1939 Lab 178 (179, 180). (Reversing A I R 1939 Lab 51.)  
 (35) AIR 1935 Lab 549 (550).  
 (09) 2 Ind Cas 18 (23) : 32 Mad 429. (Dissenting from 7 Mad 255 which was however approved by the Privy Council on another point.)  
 [See also (29) AIR 1929 All 291 (293) : 51 All 752. (Order imposing conditions on the order of sale of properties fixed by decree.)  
 (35) AIR 1935 Bom 95 (96). (Mortgage decree on null and void—Objection taken in execution that it is not saleable, and not taken at the trial of suit—Objection cannot be allowed in execution.)  
 (29) AIR 1929 Rang 275 (275).  
 [But see (36) AIR 1936 Mad 675 (677). (Question of paramount title can be raised under S. 47.)]  
 5. (39) AIR 1939 All 368 (369) : 1 L R (1939) All 385.  
 1. (18) AIR 1918 All 397 (398).  
 (09) 1 Ind Cas 459 (459) : 33 Bom 39. (Son objecting the execution on the ground of immorality of debts.)  
 (30) 127 Ind Cas 507 (509) (Bom). (33 Bom 39; AIR 1918 Bom 13, Foll.)  
 (09) 1 Ind Cas 442 (444) (Cal).  
 (07) 34 Cal 642 (648, 651, 657) (F B).  
 (87) 1887 Pun Re No. 87.  
 2. (12) 13 Ind Cas 670 (671) (Lab).  
 3. (08) 10 Bom L R 939 (942, 943) : 33 Bom 39.  
 (96) 20 Bom 385 (389).  
 (10) 6 Ind Cas 582 (583) (Cal).  
 (06) 33 Cal 676 (678).  
 (23) AIR 1923 Pat 143 (148) : 6 Pat L Jour 45E.

relating to the execution of the decree and the objection, therefore, that ancestral property has been sold as self-acquired or *vice versa* is one coming under the Section.<sup>4</sup> But where a suit on a promissory note is filed against the eldest brother (in a joint Hindu family) as a personal claim and a decree is obtained, the question of the binding character of the debt as against the other members of the joint family who are not sons or descendants of the judgment-debtor cannot be gone into in execution proceedings.<sup>5</sup>

**48. Question as to the transferability of the property proceeded against.**—Where application is made to execute a decree for money by the attachment and sale of an occupancy holding, the judgment-debtor is entitled under this Section to raise the question that the holding is not saleable according to custom or usage and to have that question determined in execution proceedings.<sup>1</sup> See also Note 45 above.

**49. Question between decree-holder and judgment-debtor in which auction-purchaser is interested.**—A question relating to execution, discharge, or satisfaction of the decree "between the parties" must be determined under this Section.<sup>1</sup> The fact that the auction-purchaser is interested in such a question does not take it out of the Section.<sup>2</sup> In *Prosunna Kumar Sunyal v. Kalidas Sunyal*,<sup>3</sup> their Lordships of the Privy Council observed as follows :

"When a question has arisen as to the execution, discharge or satisfaction of a decree between the parties to the suit in which the decree was passed, the fact that the purchaser who is no party to the suit is interested in the result, has never been held a bar to the application of the Section."

As to what is a question between the parties, see Note 5, *ante*.  
**50. Question between the execution purchaser and a party or his representative.**—As to disputes between a defaulting purchaser and a party to the suit, see O. 21 R. 71, *infra*.  
As to questions relating to delivery of possession, see Note 19, *ante*.

4. ('09) 3 Ind Cas 763 (764) (Bom.). ('06) 28 All 273 (275, 276). ('1900) 22 All 108 (110, 111). ('10) 5 Ind Cas 362 (364) : 33 Mad 423. ('30) AIR 1930 Oudh 256 (258).
5. ('35) AIR 1935 Mad 145 (146).

#### Note 48

1. ('07) 11 Cal W N 88 (85). (Objection to sale.) ('1900) 27 Cal 187 (189). (Do.) ('35) AIR 1935 All 588 (589).
- (86) 8 All 146 (148) (F B).
- (97) 24 Cal 355 (358). (Objection to sale.) ('10) 7 Ind Cas 48 (48) (Cal). (Application to set aside sale.)

- (20) AIR 1920 Pat 710 (710). (Objection to sale.) [But see ('84) 8 Bom 185 (187). (Where property to be sold is specified in the decree, the sale cannot be objected to on the ground of its non-transferability in execution proceedings.) ('03) 7 Cal W N 607 (608).
- (92) AIR 1920 Pat 715 (715). (Doubted.)]

#### Note 49

1. ('03) 13 Mad L Jour 237 (238) : 26 Mad 740. (Decree-holder himself auction-purchaser.) ('93) 16 Mad 447 (449). (Do.)

2. ('92) 19 Cal 683 (688, 689) : 19 Ind App 166 (P C).
- (21) AIR 1921 Mad 420 (422). (Following A I R 1920 Mad 324 (F B)—Question raised by judgment-debtor against auction-purchaser in which judgment-debtor and decree-holder are adversely interested is within the Section.) ('33) AIR 1933 Mad 598 (607) : 56 Mad 808. (Do.) ('34) AIR 1934 Lah 105 (106). (Do.) ('17) AIR 1917 P C 121 (123) : 41 Mad 403 : 45 Ind App 54 (P C).
- (10) 7 Ind Cas 457 (458) (Bom). (Judgment-debtor not allowed to attack sale by way of defence to suit for possession by auction-purchaser.) ('09) 3 Ind Cas 763 (764) (Bom).
- (07) 31 Bom 207 (215).
- (28) AIR 1928 Cal 865 (866).
- (99) 26 Cal 539 (544).
- (37) AIR 1937 Mad 779 (781). (Execution sale set aside—Application by auction-purchaser for refund of purchase money—Question is one under this Section.) ('28) AIR 1928 Mad 806 (807).
- (10) 8 Ind Cas 429 (423) : 34 Mad 417.
3. ('92) 19 Cal 683 (688, 689).

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**51. Setting aside sales in execution.**—As between the judgment-debtor and a decree-holder an objection to the sale in execution of the decree or an application to set it aside is one in execution and must be determined in execution and not by a separate suit.<sup>1</sup> But the power to set aside the sale, in cases where the grounds for so setting it aside fall within O. 21 Rr. 89, 90 or 91, is circumscribed by those provisions. To hold otherwise would be to render those provisions superfluous so far as parties to the suit or their representatives are concerned. An application to set aside a sale on grounds *not within the purview of those provisions* must be dealt with under this Section independently of those provisions.<sup>2</sup>

**52. Decree obtained by fraud.**—A question whether a decree was obtained by fraud or collusion is not one which relates to the execution of the decree but one which affects its very subsistence and *validity* and such a question can only be raised by a separate suit.<sup>3</sup> See also Note 29 *supra* and Section 38 Note 8. Therefore, where not only the sale is impugned as being fraudulent, but the very decree in execution of which the sale took place is impeached as having been obtained by fraud, the Section is not a bar to a suit to set aside the sale thereunder.<sup>4</sup>

**53. Fraud in execution proceedings.**—Where a judgment-debtor impeaches the validity of an execution sale, not on the ground of fraud in the *publishing* and *conducting* of the sale, but on the ground of fraud in execution proceedings which *preceded and led up to* the sale, the question, as between the parties, is one falling within this Section and not under O. 21 R. 90.<sup>5</sup>

Note 51  
 1. (11) 34 Mad 417 (418).  
 (10) 7 Ind Cas 457 (458, 459) : 34 Bom 546.  
 (95) 1905 All W N 55 (56).  
 (98) 20 All 254 (256).  
 (93) AIR 1934 Nag 21 (27) : 31 Nag L R 67.  
 (Application by judgment-debtor to set aside sale  
 auction-purchaser not made party—Application  
 is one under this Section.)  
 (13) 21 Ind Cas 570 (571) : 16 Oudh Cas 255.  
 (05) 8 Oudh Cas 254 (256).  
 (31) AIR 1981 Pat 97 (98).  
 2. See (37) AIR 1937 All 407 (409, 410).  
 Note 52  
 the part of the auction-purchaser.)  
 on  
 (02) 24 All 239 (241).  
 (01) 23 All 478 (480).  
 (09) 4 Ind Cas 253 (254) : 33 Bom 698.  
 (85) 9 Bom 468 (471).  
 (82) 6 Bom 148 (150).  
 (26) AIR 1926 Cal 1219 (1220).  
 (18) AIR 1918 Cal 171 (173). (Fraudulent suppres-  
 sion of process.)  
 (16) AIR 1916 Cal 109 (110).  
 (09) 3 Ind Cas 116 (117) (Cal).  
 (07) 5 Cal L four 328 (331).  
 (06) 10 Cal W N 130 (133) : 33 Cal 84.  
 (02) 6 Cal W N 288 (285).  
 (02) 6 Cal W N 279 (281). (Fraud alleged to be on

1. ('10) 7 Ind Cas 11 (14) (All).  
('96) 23 Cal 639 (641).  
('20) AIR 1920 Lah 164 (164).  
('16) AIR 1916 Mad 792 (793) : 38 Mad 221.  
('89) 12 Mad 503 (504).  
('86) 9 Mad 80 (83).  
('99) 12 C P L R 82 (83, 84, 85).  
2. ('14) AIR 1914 P C 72 (73) : 42 Cal 244 : 41 Ind App 267 (P O).  
('02) 6 Cal W N 478 (477) : 29 Cal 395: 29 Ind App 99 (P C).  
('01) 28 Cal 475 (478, 479) (P C).  
('01) 5 Cal W N 559 (560, 561).  
(1900) 27 Cal 197 (200).  
('99) 26 Cal 326n (332n).  
('97) 24 Cal 546 (551).  
('97) 21 Cal 605 (608).  
Note 53  
1. ('11) 10 Ind Cas 625 (625) (Cal).  
('17) AIR 1917 Low Bur 80 (81).  
('06) 28 All 681 (682, 683).  
('05) 27 All 702 (703).  
('05) 1 Cal 1, Jour 476 (480, 481) : 32 Cal 957 (P B).  
mortgage—Suit not maintainable.)  
inclusion of properties not comprised in the  
invalidity on ground of wrongful and fraudulent  
decree—Execution sale—Suit for declaration of  
[See also ('36) 40 Cal W N 428. (Mortgage  
(19) AIR 1919 Pat 396 (398).  
('21) AIR 1921 Pat 54 (57).  
('18) AIR 1918 Oudh 379 (385).  
('80) 2 Mad 264 (270).  
notice of sale proclamation.)  
('30) AIR 1930 Mad 489 (489). (Omission to serve  
('84) 10 Cal 410 (412).  
('90) 17 Cal 769 (772, 777) (P B).  
('92) 19 Cal 688 (689) : 19 Ind App 166 (P C).  
('98) 2 Cal W N 691 (693).  
('99) 3 Cal W N 399 (400) : 26 Cal 324.  
('99) 26 Cal 539 (542).  
('99) 3 Cal W N 538 (540).  
('01) 28 Cal 116 (118).  
('99) 3 Cal W N 691 (693).  
('92) 19 Cal 688 (689) : 19 Ind App 166 (P C).  
('84) 10 Cal 410 (412).  
('30) AIR 1930 Mad 489 (489). (Omission to serve  
notice of sale proclamation.)  
('80) 2 Mad 264 (270).  
('18) AIR 1918 Oudh 379 (385).  
('21) AIR 1921 Pat 54 (57).  
(19) AIR 1919 Pat 396 (398).  
[See also ('36) 40 Cal W N 428. (Mortgage  
decree—Execution sale—Suit for declaration of  
invalidity on ground of wrongful and fraudulent  
inclusion of properties not comprised in the  
mortgage—Suit not maintainable.)  
('05) 1 Cal 1, Jour 476 (480, 481) : 32 Cal 957 (P B).

**54. Fraud anterior to sale.** — See Note 53 above.

**55. Fraud in publishing and conducting the sale.** — As has been seen in Note 51 *ante*, the question of setting aside an execution sale on any ground is, as between the parties, one falling under this Section. This would therefore include an application to set aside a sale for fraud in publishing and conducting the sale.<sup>1</sup> The question, however, whether such an application falls within the terms of O. 21 R. 90 is important because, if it does, the Court cannot, except under the conditions specified in that Rule, set aside the sale. (See Note 51.) It is also important for the purpose of determining whether it is a *decree* or only an *appealable order*. For, if it is one covered by O. 21 R. 90, it is only an appealable order though it may fall under Section 47 also, inasmuch as Section 2 clause (2) enacts that the word "decree" includes the determination of any question within Section 47 but does not include any adjudication *from which appeal* lies as an appeal from an order. The word "fraud" was absent in Section 311 of the old Code corresponding to O. 21 R. 90 of the present Code, and, in the absence thereof, it was held that an application to set aside a sale on the ground of fraud could only come under Section 244 (now Section 47) and not under Section 311.<sup>2</sup> Under the present Code, however, O. 21 R. 90 covers such cases<sup>3</sup> though the provisions of the new Code cannot retrospectively affect the character of an order passed under the old Code and take it out of the Section.<sup>4</sup>

An application to set aside a sale on *grounds not within* O. 21 R. 90 and 91 falls, as has been seen in Note 51 *ante*, under Section 47 only and the order on such application is appealable as a decree.<sup>5</sup> See Notes under O. 21 R. 90, Note 10.

**56. Other grounds for setting aside sale.** — See Notes 57 to 71, *infra*.

**57. Property not saleable.** — See Note 45 above.

**58. Reversal of decree.** — As has been seen in Note 51 *ante*, the question between the parties of *setting aside the sale* on any ground (including the ground of reversal or variation of the decree) is one in execution falling within this Section. As to whether a claim for restitution of properties taken in execution of such a decree is one in execution of the decree or not, see Notes 30 and 33 of Section 144 *infra*.

**59. Amendment of decree after sale.** — See Notes 39 and 58 above and Notes 4, 13, 30 and 33 to Section 144 *infra*.

**60. Ex parte decree set aside after sale.** — Where a property is sold in execution of an *ex parte* decree and purchased by the decree-holder and the decree is subsequently set aside under O. 9 R. 13, an application under this Section and not a suit is the remedy to set aside the sale.<sup>1</sup> See Note 51 *ante*.

(38) AIR 1938 Lah 690 (691). (Application under O. 21 R. 89 fraudulently removed and Court not passing orders thereon — Question of fraud cannot be agitated in a separate suit.)

#### Note 55

1. (31) AIR 1931 Pat 97 (98).  
1a. (05) 2 All L Jour 469 (470) : 27 All 702.

(04) 31 Cal 385 (390).  
(99) 26 Cal 539 (540, 544, 545).

(89) 26 Cal 824 (326, 331).

(92) 19 Cal 341 (344, 345).

(91) 18 Cal 139 (143).

(82) 5 Mad 217 (219).

2. (11) 9 Ind Cas 135 (135, 136) (Cal).

(29) AIR 1929 Nag 130 (131) : 25 Nag L.R. 58.

(28) AIR 1928 All 354 (354).

1. (1900) 27 Cal 810 (813, 814).  
(1900) 27 Cal 197 (200).  
(09) 1 Ind Cas 744 (744) : 31 All 364.

#### Note 60

(31) AIR 1931 Rang 179 (180).  
[See (28) AIR 1928 Lah 444 (444).]  
3. (12) 16 Ind Cas 690 (691) (Cal).  
4. (94) 7 C P L R 14 (15). (Irregularity in attachment and sale.)  
(19) AIR 1919 Pat 396 (398).  
(37) AIR 1937 All 407 (410). (Application to set aside sale on the ground of its being null and void.)  
(36) AIR 1936 Lah 573 (574). (Order setting aside sale for want of jurisdiction to sell property without attachment—Second appeal lies.)  
[See also (24) AIR 1924 Mad 778 (779).]



**61. Want of notice under O. 21 Rr. 16, 22 and 66.**—An objection against a sale in execution of a decree on the ground that no notice was served on the judgment-debtor under O. 21 R. 22,<sup>1</sup> or under Rule 66,<sup>2</sup> and an application to set it aside on that ground is one falling under the Section. Where, however, such notice is not necessary the question cannot be considered to be one under the Section.<sup>3</sup> The question of the irregularity or illegality of a notice under O. 21 R. 16, and its effect upon execution proceedings and sale is, as between the parties, one that must be determined under this Section.<sup>4</sup>

**62. Purchase by decree-holder without permission.**—A judgment-debtor seeking to set aside a sale of his land on the ground that the decree-holder has purchased it without permission to bid, must proceed only under this Section and not by a suit.<sup>1</sup>

**63. Setting aside sale on deposit.**—Under the old Code, an order under Section 310 A (O. 21 R. 89) was not appealable *as an order* and it was held that a question of setting aside a sale on deposit of the decree amount was, as between the parties, one under Section 244 (now Section 47) of the Code, and open to second appeal.<sup>1</sup> Under the present Code, however, such an order is only an *appealable order* and, though it may be one under Section 47 also, is not a decree open to second appeal.<sup>2</sup> See Note 55 above.

**64. Judgment-debtor having no saleable interest.**—Order 21 R. 91 enacts that a *purchaser* at the execution sale can apply to have the sale set aside on the ground that the judgment-debtor had no saleable interest in the property sold. Obviously, such an application is not one between parties to the suit and does not lie under Section 47.<sup>1</sup> A *judgment-debtor* seeking to set aside the sale on the ground that

- (20) AIR 1920 Bom 12 (12) : 44 Bom 702.  
 (19) AIR 1919 Bom 175 (176) : 43 Bom 235.  
 (107) 6 Cal L Jour 102 (104).  
 (99) 3 Cal W N 6 (7).  
 (98) 25 Cal 175 (177, 178).  
**Note 61**  
 1. (26) AIR 1926 Cal 539 (540).  
 (18) AIR 1918 Cal 171 (172).  
 (31) AIR 1931 All 145 (146).  
 (81) 3 All 424 (426).  
 (31) AIR 1931 Cal 555 (556) : 58 Cal 825.  
 (12) 15 Ind Cas 506 (507) : 40 Cal 45.  
 (11) 9 Ind Cas 584 (585) (Cal).  
 (10) 5 Ind Cas 390 (393, 394) (Cal).  
 (98) 21 Cal 19 (22, 23).  
 (30) AIR 1930 Mad 12 (15).  
 (24) AIR 1924 Mad 431 (436, 437) : 47 Mad 288 (FR).  
 (26) AIR 1926 Pat 397 (397).  
 (24) AIR 1924 Pat 67 (68).  
 2. (08) 32 Bom 572 (574).  
 (35) AIR 1935 Mad 438 (439).  
 (80) AIR 1930 Mad 489 (489).  
 (25) AIR 1925 Mad 1142 (1142).  
 (20) AIR 1920 Mad 481 (484).  
 (19) AIR 1919 Pat 396 (398).  
 (24) AIR 1924 Rang 124 (124) : 1 Rang 533.  
 3. (24) AIR 1924 Pat 111 (112) : 2 Pat 916.  
 4. (20) AIR 1920 Lah 251 (253).  
**Note 62**  
 1. (22) AIR 1922 P C 386 (388) : 49 Ind App 312 : 1 Pat 733 (P C).  
 (01) 23 All 478 (480).

- (1900) 22 All 108 (110).  
 (98) 22 Bom 271 (277).  
 (87) 11 Bom 588 (590).  
 (32) AIR 1932 Cal 672 (674) : 36 Cal W N 125 (126, 127) : 59 Cal 956. (Receiver having no special leave to bid.)  
 (28) A I R 1928 Lah 666 (667).  
 (12) 17 Ind Cas 126 (126) (Mad).  
 (93) 16 Mad 287 (289).  
 (82) 5 Mad 217 (219).  
**Note 63**  
 1. (07) 29 All 275 (276).  
 (07) 31 Bom 207 (214).  
 (01) 25 Bom 418 (422).  
 (11) 10 Ind Cas 51 (53) (Cal).  
 (08) 7 Cal L Jour 282 (284).  
 (01) 28 Cal 73 (76).  
 (1900) 6 Cal W N 57 (60).  
 (97) 1 Cal W N 703 (705).  
 (10) 8 Ind Cas 855 (856) (Mad).  
 (07) 30 Mad 507 (508).  
 (98) 21 Mad 416 (417).  
 (02) 5 Oudh Cas 377 (378).  
 2. (20) AIR 1920 Bom 60 (60) : 44 Bom 472 (473, 474).  
 (11) 10 Ind Cas 345 (345) : 38 Cal 339.  
 (26) AIR 1926 Mad 620 (621). (Doubtful if a second appeal lies from an order under O. 21 R. 89 even if auction-purchaser is the decree-holder.)  
**Note 64**  
 1. (09) 3 Ind Cas 438 (439) (Cal).

he had no saleable interest cannot do so under O. 21 R. 91. Nor can he, as against the *action-purchaser*, do so under Section 47, as the question is not one between parties to the suit.<sup>2</sup> As against the decree-holder, however, such an application will clearly fall under Section 47 and a fresh suit will be barred in respect of such relief.<sup>3</sup> But where the sale is in execution of a *mortgage decree*, an objection that the judgment-debtor had no saleable interest in the property is really an attack on the decree itself and cannot be gone into by the executing Court.<sup>4</sup>

**65. Sale in contravention of the Transfer of Property Act.**—A sale of property in contravention of the provisions of Order 34 of this Code can be set aside, as between the parties to the suit, only by an application under this Section and not by a suit.<sup>1</sup>

**66. Sale in contravention of stay order.**—An application to set aside a sale held in contravention of a stay order is as between the parties to the suit one under this Section.<sup>1</sup> But where the original application for stay as well as the order for stay is without jurisdiction, as where an application was made to the original Court after the transfer of the decree to the Collector for execution under Section 68 of the Code, an application to set aside the sale on the ground of its being one in contravention of the stay order is not one under Section 47.<sup>2</sup>

**67. Sale in contravention of injunction order.**—Where a judgment-debtor seeks to set aside the sale on the ground that it was held during the pendency of a temporary injunction, his remedy, if any, is by an application under this Section and not by a separate suit.<sup>1</sup> It has been held that where a sale takes place in contravention of an express direction of the Court, the latter has an *inherent* power to set it aside *suo motu*.<sup>2</sup>

**68. Sale not warranted by decree.**—The proper procedure to set aside a sale on the ground that it is not warranted by the terms of the decree or that it was held in contravention of the directions contained therein is, as between the parties to the suit, by an application under this Section and not by a suit.<sup>1</sup>

**69. Sale under time-barred decree.**—A separate suit does not lie to set aside a sale in execution of a decree on the ground that at the time of execution it was barred by time; the remedy as between the parties to the suit is by an application under this Section.<sup>1</sup> See also Order 21 Rule 94.

(93) AIR 1933 Lah 570 (573). (To set aside sale on the ground that non-mortgaged properties have been sold before sale of mortgaged properties.)

2. (83) 1883 All W N 218 (218).

(24) AIR 1924 All 273 (274).

[See also (85) 7 All 641 (644).]

3. (83) 1883 All W N 218 (218).

4. (26) AIR 1926 Pat 202 (204): 4 Pat 696.

(29) AIR 1929 Rang 275 (275).

Note 65

1. (17) AIR 1917 P C 121 (123): 45 Ind App 54:

41 Mad 403 (PC).

(06) 28 All 681 (682, 683).

(21) AIR 1921 Bom 285 (287, 288): 45 Bom 174.

(07) 9 Bom L R 462 (466).

(08) 35 Cal 61 (66, 80) (FB).

(06) 33 Cal 283 (286).

(03) 30 Cal 142 (153).

(07) 30 Mad 818 (815).

(1900) 23 Mad 377 (382).

1. (25) AIR 1925 All 551 (552).

(75) 24 Suth W R 452 (452).

(28) AIR 1928 Mad 140 (141).

(17) AIR 1917 Mad 877 (879).

(12) 13 Ind Cas 133 (134) (Mad).

(28) AIR 1928 Rang 215 (217).

Note 69

1. (13) 21 Ind Cas 938 (940) (Cal).

(78) 23 Suth W R 257 (258).

**70. Sale without jurisdiction.**—Even where the sale is held without jurisdiction, as where, at the time of the sale the judgment-debtor is dead,<sup>1</sup> or the property is outside the territorial jurisdiction of the Court,<sup>2</sup> a party seeking to set aside the sale on that ground must do so under this Section.

**71. Other grounds for setting aside sale.**—A judgment-debtor may seek to set aside an execution sale on grounds other than the ones set out above in Notes 54 to 70. The following are some of the cases in which only an *application* under this Section lies and not a separate suit—

- (a) Where the receiver of an insolvent's estate seeks to set aside an execution sale on the ground of a prior adjudication of the debtor.<sup>1</sup>
- (b) An objection by the judgment-debtor to the sale founded on a misdescription of the terms of the decree in the execution application.<sup>2</sup>
- (c) An objection by the judgment-debtor that the execution sale was void on the ground that the auction-purchaser, the liquidator of the decree-holder company, was not competent to bid for, and purchase, any property as liquidator under law.<sup>3</sup>
- (d) Where the decree-holder seeks to set aside a sale on the ground of material irregularity in that the permission granted to him to bid has been modified behind his back.<sup>4</sup>
- (e) Where the sale is sought to be set aside on the ground of failure of the purchaser to make the deposit of 25 per cent. required under O. 21 R. 84.<sup>5</sup>
- (f) Where it is sought to be set aside on the ground that the decree has been satisfied before the sale.<sup>6</sup>
- (g) Where the decree-holder seeks to set aside the sale on the ground that the decree-holder's own property was sold by mistake instead of that of the judgment-debtor.<sup>7-9</sup> See also Note 6 to O. 21 R. 64.
- (h) Where the sale is sought to be set aside on the ground that the petition to set aside the sale was compromised behind the applicant's back and in fraud of his rights,<sup>9</sup> or by the judgment-debtor's son without authority.<sup>10</sup>
- (i) Where a receiver appointed under O. 40 R. 1 purchases the property in court-sale in the capacity of decree-holder without obtaining *special* leave for that purpose, even though he has obtained leave under O. 21 R. 72.<sup>11</sup>

**72a. Miscellaneous.**—Apart from the particular classes of questions relating to the execution, discharge or satisfaction of the decree, discussed in Notes 29 to 71

(73) 20 South W R 5 (6).  
(70) 13 South W R 273 (274, 275).

#### Note 70

1. (15) AIR 1915 Cal 268 (271).  
(90) 12 All 440 (446) (FB).

2. (24) AIR 1924 All 261 (262, 263) : 46 All 153.  
(90) 17 Cal 699 (704) (FB).

#### Note 71

1. (17) AIR 1917 Mad 924 (925).  
(95) AIR 1935 Cal 508 (504) : 62 Cal 457. (The

receiver is the representative of both the insolvent and his creditor.)  
2. (98) 8 Mad L Jour 115 (116).

3. (28) AIR 1928 Lah 666 (667).  
4. (25) AIR 1925 Oudh 381 (382).

5. (89) 16 Cal 33 (36, 39).

10. (02) 24 All 209 (210, 211).  
11. (32) AIR 1932 Cal 672 (674) : 69 Cal 355.

7-8. (28) AIR 1928 Cal 865 (867).

Court.)

Sale cannot be set aside on ground of authority—Sale cannot be set aside.

(10) 37 Cal 107 (116). (Bona fide purchaser—chaser—Sale cannot be set aside.)

[See also (97) 21 Bom 468 (464). (Bona fide purchaser—Sale cannot be set aside.)

(11) 9 Ind Cas 452 (452) (Low Bur).

(18) 21 Ind Cas 938 (942) (Cal).

(11) 12 Ind Cas 911 (912) : 36 Bom 156.

(94) 16 All 5 (8).

6. (1900) 22 All 86 (88). (Suit by decree-holder and judgment-debtor against auction-purchaser.)

(11) 9 Ind Cas 66 (67) (Cal). (Failure to pay the amount makes the sale void.)

*supra*, the following have also been held to be questions coming within the Section—

1. A question as to the legality of the procedure or the jurisdiction of the executing Court to order a sale.<sup>1</sup>

2. An order deciding whether a decree is time-barred or not.<sup>2</sup>

3. An order directing execution to issue or refusing to execute a decree.<sup>3</sup>

4. An order recognising, or refusing to recognise, an assignment of a decree.<sup>4</sup>

5. The determination of a question in execution as to who is the legal representative of a party to the suit.<sup>5</sup> (See also Note 27.)

6. An order on an application for transfer of a decree.<sup>6</sup>

7. An order directing mortgaged properties to be sold in a particular order.<sup>7</sup>

8. All questions regarding liability to attachment and sale.<sup>8</sup>

### Note 71a

1. ('29) AIR 1929 Lah 449 (452). (Objection regarding defect of attachment.)
- ('20) AIR 1920 Lah 443 (444).
- ('20) AIR 1920 Oudh 21 (22).
- ('28) AIR 1928 Rang 40 (41); 5 Rang 775. (Refusal of the transmitting Court to decide executability of decree and leaving it to the executing Court.)
2. ('24) AIR 1924 Pat 683 (685, 686).
- ('29) AIR 1929 All 287 (287) : 51 All 640.
- ('13) 21 Ind Cas 938 (940) (Cal).
- ('14) AIR 1914 Lah 415 (416) : 1913 Pun Re No. 110.
3. ('36) AIR 1936 Mad 801 (801).
- ('27) AIR 1927 Mad 842 (843).
- ('15) AIR 1915 Cal 238 (239).
- ('15) AIR 1915 Mad 197 (198) : 12 Ind Cas 664 (666) : 37 Mad 29.
- ('15) AIR 1915 P C 88 (89) (PC). (Disallowing judgment-debtor's objections to execution.)
- ('14) AIR 1914 All 288 (289). (Do.)
- ('88) 1888 All W N 245 (246). (Do.)
- ('01) 28 Cal 81 (83) (Do.)
- ('83) 9 Cal 872 (874). (Do.)
- ('13) 19 Ind Cas 921 (922) (Lah). (Do.)
- ('16) AIR 1916 Upp Bur 1 (2) : 2 Upp Bur Rul 119. (Order refusing to execute.)
- ('27) AIR 1927 All 574 (575). (Do.)
- ('03) 25 All 443 (445).
- ('87) 1887 All W N 19 (20) : 9 All 229. (Refusal to execute for the amount claimed.)
- ('83) 5 All 212 (213, 214). (Order requiring successful certificate before execution.)
- ('83) 7 Bom 301 (302). (Refusal of an order under O. 21 R. 21.)
- ('37) AIR 1937 Cal 425 (426). (Order directing execution to proceed.)
- ('09) 1 Ind Cas 284 (284, 285) (Cal).
- ('29) AIR 1929 Lah 390 (390). (Order holding that amount due under an installment decree did not fall due under a default clause.)
- ('24) AIR 1924 Lah 604 (604, 605). (Refusal to execute against the person of the judgment-debtor.)
- ('20) AIR 1920 Lah 117 (118).
- ('35) AIR 1935 Mad 647 (648).
- ('08) 31 Mad 406 (408).
- ('94) 17 Mad 394 (395). (An order under O. 21 R. 15)
- allowing one of several decree-holders to apply for execution.)
- ('26) AIR 1926 Pat 202 (203) : 4 Pat 696. (On the ground that property comprised in the decree not saleable.)
- ('22) AIR 1922 Pat 59 (60).
- ('36) AIR 1936 Pesh 46 (47). (Order refusing execution and directing the filing of a fresh application.)
- ('17) AIR 1917 Low Bur 179 (179) : 8 Low Bur Rul 300. (Refusal to execute a decree against a partner obtained against a firm.)
- ('16) AIR 1916 Cal 471 (472).
- (1900) 27 Cal 670 (672).
- ('22) AIR 1922 Lah 396 (397).
- ('38) AIR 1938 Mad 78 (79).
- ('17) AIR 1917 Mad 605 (606, 607).
- ('17) AIR 1917 Mad 293 (294) : 40 Mad 299. (Order recognising assignment and allowing execution is a decree.)
- ('15) AIR 1915 Mad 1138 (1140).
- ('10) 6 Ind Cas 199 (199) (Mad).
- ('02) 25 Mad 383 (385).
- ('25) AIR 1925 Pat 449 (450) : 4 Pat 120.
- [See ('68) 10 South W R 144 (145).]
- [But see ('35) AIR 1935 Lah 609 (610). (Reversing AIR 1934 Lah 51 (52).]
5. ('25) AIR 1925 All 578 (579) : 47 All 865.
- ('26) 98 Ind Cas 783 (783) (Mad).
6. ('04) 8 Cal W N 575 (577).
- [But see ('10) 8 Ind Cas 168 (171) : 35 Bom 103.
7. ('26) AIR 1926 Mad 834 (835).
- ('24) AIR 1924 Mad 365 (366).
- ('08) 7 Cal L Jour 270 (272).
- ('78) 4 Cal L Rep 27 (28).
- ('25) AIR 1925 Pat 484 (485).
8. ('05) 9 Cal W N 972 (972).
- ('34) AIR 1934 Nag 82 (82, 83) : 30 Nag L R 135.
- ('76) 1 All 668 (669, 675) : 5 Ind App 87 (PC). (Appeal from order misconstruing a decree lies.)
- ('09) 1 Ind Cas 78 (78) (All). (Order under S. 63.)
- ('33) AIR 1933 Bom 185 (186).
- ('17) AIR 1917 Cal 182 (182). (Order under S. 63.)
- ('14) AIR 1914 Cal 828 (829) : 41 Cal 418.
- ('97) 24 Cal 473 (487, 489).
- ('20) AIR 1920 Lah 117 (118).
- ('26) AIR 1926 Oudh 193 (194).
- ('17) AIR 1917 Oudh 96 (99).



19. A question as to discharge of a receiver.<sup>19</sup>
20. Enquiry regarding substituted share of judgment-debtor's property or accretions to his property.<sup>20</sup>
21. Questions relating to the enforcement of security or relating to orders requiring security under O. 41 R. 5.<sup>21</sup>
22. As to questions under O. 21 R. 71 and Section 73, see those Sections.
23. As to application by decree-holder purchaser for refund of purchase money where the sale is set aside in a separate suit, see Note 4 to O. 21 R. 93.
24. Questions as to the absence of or irregularity in the attachment of the property to be sold.<sup>21a</sup>
25. Question relating to payments by instalments under O. 20 R. 11 as amended in Madras, Nagpur and Rangoon.<sup>21b</sup>
26. Question whether an instalment decree is executable in its entirety by reason of default in payments.<sup>21c</sup>

The following have been held to be *questions not relating to execution, discharge or satisfaction of the decree*—

1. An order made by a Court exercising a power given to it by a provision in a scheme framed in a scheme suit.<sup>22</sup>
2. Questions relating to the rights of a third party subrogated to the rights of a mortgagee decree-holder by payment at the instance of the mortgagor.<sup>23</sup>
3. A mortgagor's right to possession as against the mortgagee who is entitled under a decree to be in possession till his debt is paid off.<sup>24</sup>
4. An objection by a prior mortgagee to the sale of the mortgaged property in execution of puisne mortgagee's decree.<sup>25</sup>
5. The enforcement of a right under a decree which merely *declares* it.<sup>26</sup>

19. ('18) AIR 1918 Pat 60 (61) : 3 Pat L Jour 513. (Receiver appointed during execution proceedings.)

('80) 5 Bom 45 (48). (Receiver for management of estate appointed by a decree.)

20. ('22) AIR 1922 P C 54 (55) : 1 Pat 378 : 49 Ind App 139 (PC).

('17) AIR 1917 Pat 253 (257) : 2 Pat L Jour 496.

('25) AIR 1925 P C 86 (88) : 52 Ind App 137 : 49 Bom 233 (PC). (Accretions.)

('29) AIR 1929 Oudh 263 (264, 265).

('17) AIR 1917 Pat 126(127,128) : 3 Pat L Jour 339.

21. ('18) AIR 1918 Mad 442 (442) : 41 Mad 327.

('30) AIR 1930 Pat 108 (109, 110) : 8 Pat 801 : (AIR 1919 P C 55, Foll.)

('82) 8 Cal 477 (478).

('34) AIR 1934 Rang 231 (232). (Obiter.)

21a. ('30) AIR 1930 Mad 414 (415).

21b. ('26) AIR 1926 Rang 192 (192) : 4 Rang 247.

('32) AIR 1932 Rang 54 (55).

21c. ('29) AIR 1929 Lah 390 (391).

22. ('25) AIR 1925 P C 155 (156) (PC).

('26) AIR 1926 Bom 130 (130).

('26) AIR 1926 Bom 167 (167). (Power exercised by District Judge as persona designata.)

('27) AIR 1927 Mad 1110 (1110).

[See ('38) AIR 1938 Rang 363 (364). (Orders passed merely for carrying out a scheme are orders in execution and appealable under S. 47.—AIR 1925 P C 155, Distinguished.)]

[But see ('14) AIR 1914 Low Bur 226 (228).]

23. ('25) AIR 1925 Mad 129 (130, 131).

('05) 27 All 400 (402).

('05) 27 All 325 (332, 333) : 32 Ind App 128 (PC).

('22) AIR 1922 Lah 358 (360).

[See ('32) AIR 1932 All 49 (50). (Questions as to priority of mortgages more for suits than for execution proceedings.)]

[See also ('09) 1 Ind Cas 744 (744) : 31 All 364.]]

[But see ('10) 5 Ind Cas 142 (143) : 37 Cal 282.

(But the rights of a prior mortgagee-defendant getting subrogated must be decided in execution.)]

24. ('16) AIR 1916 Cal 43 (44). (Mortgagee in possession in pursuance of a decree for ejectment—Suit for redemption not barred by S. 47.)

('98) 20 All 506 (510).

('04) 6 Bom L R 1100 (1101).

('75) 12 Bom H O R 160 (162).

25. ('27) AIR 1927 Mad 431 (432).

('25) AIR 1925 Nag 185 (185, 186).

26. ('14) AIR 1914 All 103 (103, 104). (Declaration that defendant must vacate when plaintiff desires.)

('28) AIR 1928 Bom 365 (366).

('36) 164 Ind Cas 921 (925) (Cal).

[See also ('06) 28 All 72 (73). (Decree-holder making construction in excess of decree—Application for demolition under S. 47 does not lie.)

('05) 2 All L Jour 573 (575). (Do.)]

See also the undermentioned cases.<sup>27</sup>

27. ('11) 9 Ind Cas 828 (829) (Lah). (Order of Court staying issue of warrant of attachment on judgment-debtor's representation that he would pay the amount within a particular time.)
- ('39) AIR 1939 Pat 248 (249). (Partition decree among co-sharers giving plaintiff right to realize certain rents—Another co-sharer collecting it—Separate suit for such rent is not barred.)
- ('69) 13 Moo Ind App 69 (76) (P C). (Claim for damages in respect of property purchased.)
- ('37) AIR 1937 All-635 (636). (Decision of a claim in accordance with O. 38 R. 8 is not one under S. 47.)
- ('29) AIR 1929 All 666 (666). (Extending time fixed by a decree.)
- ('14) AIR 1914 All 440 (441). (Suit for declaration of title under a prior decree for pre-emption.)
- (1900) 1900 All W N 135 (136). (Decree for possession—Judgment-debtor not allowed to set up claim for maintenance in execution proceedings.)
- ('95) 17 All 243 (244). (Order striking off execution but maintaining attachment.)
- ('39) AIR 1939 Bom 182 (183). (An order refusing to direct the value of the property to be stated in the sale proclamation under O. 21 R. 66 is not a decree under S. 47 and is not appealable.)
- ('31) AIR 1931 Bom 295 (296, 297). (Extraneous terms forming consideration for a compromise decree—Executable.)
- ('39) AIR 1939 Cal 334 (335). (Court receiving notice, after sale, under the Bengal Agricultural Debtors Act—Question whether sale should be set aside is one under S. 47.)
- ('37) AIR 1937 Cal 211 (212) : I L R (1937) 1 Cal 781. (An objection by the judgment-debtor that a scheme sanctioned by the Court under S. 153 of the Companies Act has superseded the decree which has, therefore, become incapable of execution, relates to the execution or discharge of the decree and consequently comes within S. 47.)
- ('36) 164 Ind Cas 802 (803) (Cal). (Where the execution proceedings taken in the Civil Court in pursuance of an award under the Co-operative Societies Act are set aside, and the Court passes an order under S. 151, Civil P. C., remitting the award to the arbitrator for rectification of certain errors therein, the order is not one falling under S. 47.)
- ('33) AIR 1933 Cal 668 (672): 60 Cal 801. (Trusts—Creditor of trustee—Right of subrogation to trustee's right of indemnity can be decided in suit by creditor against trustee, but not in execution.)
- ('25) AIR 1925 Cal 286 (288). (Enforcement of provisions in a compromise decree extraneous to the subject-matter of suit is by separate suit though such provisions form consideration for compromise.)
- ('19) AIR 1919 Cal 806 (807). (Order merely allowing a payment directed by the decree.)
- ('13) 19 Ind Cas 904 (905) (Cal). (Order allowing decree-holder to withdraw execution proceedings.)
- ('12) 16 Ind Cas 543 (545) (Cal). (Application by minor after majority to set aside sale on the ground of negligence of guardian.)
- ('08) 7 Cal L Jour 436 (438). (Refusal to grant sale certificate.)
- ('06) 4 Cal L Jour 211 (219). (Question whether a person has acquired a valid title in sale.)
- (1900) 4 Cal W N 39 (40). (Order on an application for review of an order dismissing an execution case for non-payment of process fees.)
- ('23) AIR 1923 Pat 180 (183). (Do.)
- ('99) 26 Cal 529 (531). (Order amending a sale certificate.)
- ('97) 20 Mad 487 (489). (Do.)
- ('39) AIR 1938 Lah 214 (215, 216). (Application for temporary alienation of judgment-debtor's land—Mortgage created and mortgagee given possession though he had not paid the money—Decree recorded as fully satisfied by mortgage—Subsequent suit by decree-holder against mortgagee for the money not barred, as question was not one relating to execution, discharge or satisfaction of decree.)
- ('38) AIR 1938 Lah 4 (5). (Amendment of decree under Ss. 151 and 152.)
- ('27) AIR 1927 Lah 337 (337). (Order setting aside confirmation of sale.)
- ('24) AIR 1924 Lah 405 (407). (Infringement of rights declared by a decree—S. 47 does not apply.)
- ('18) AIR 1918 Lah 63 (63): 1918 Pun Re No. 43. (Order amending a decree.)
- ('14) AIR 1914 Lah 24 (25): 1914 Pun Re No. 12. (Suit against prior mortgagee for redemption and for possession against mortgagor decreed in favour of subsequent mortgagee—Subsequent suit for possession against mortgagor on the ground that redemption money had been paid not barred—S. 47.)
- ('07) 1907 Pun Re No. 5, page 30. (S. 47 bars a regular suit where question relating to execution is raised bona fide.)
- ('39) AIR 1938 Mad 307 (313). (Decree in partition suit not engrossed on proper non-judicial stamp—Decree-holder applying to executing Court for having decree engrossed on proper stamp—Order of executing Court is not one under S. 47.)
- ('86) AIR 1936 Mad 733 (742, 743). (Question of paramount title cannot be raised in proceedings for execution of mortgage decree.)
- ('28) AIR 1928 Mad 296 (297). (Application by plaintiff for payment of money deposited by petitioner when applying for setting aside ex parte decree.)
- ('22) AIR 1922 Mad 63 (63). (Decree-holder selling his own property by bona fide mistake—Remedy is by separate suit.)
- ('18) AIR 1918 Mad 914 (915). (Refusal of an application for cheque.)
- ('08) 31 Mad 37 (39, 40). (Claim for damages in respect of property purchased.)
- ('30) AIR 1930 Nag 199 (200) : 26 Nag L R 187. (Landlord acquiring the interest of judgment-debtor under S. 6, C. P. Tenancy Act, was held not to represent the judgment-debtor within the meaning of S. 47.)
- ('23) AIR 1923 Nag 327 (328). (Whether crops passed in a pre-emption decree which was silent about this.)

**72. "Shall be determined by the Court executing the decree and not by a separate suit."** — All objections that can be raised in execution under this Section "shall be determined by the Court executing the decree and not by a separate suit."<sup>1</sup> The words "by a separate suit" have given rise to a conflict of decisions as to whether the bar of suit applies only where the questions are raised by a party *as plaintiff* in a suit, or whether it applies to such questions raised in *defence* to a suit as well. The High Court of Calcutta has held that the Section bars a plea in *defence* also on the ground that the words "shall be determined by the Court executing the decree" give *exclusive jurisdiction* over the matter to the Court executing the decree, and cannot be merely construed to mean that the executing Court must determine it *if it is raised* in the course of execution proceedings.<sup>2</sup> But it has been also held by that High Court that where the defendant has been kept out of knowledge of the execution proceedings, until after the suit has been brought, by the fraud of the decree-holder, he could raise such objections by way of defence to the suit.<sup>2a</sup>

The High Court of Madras has, on the other hand, held that the bar is not applicable to pleas in defence.<sup>3</sup> It has followed the undermentioned case of the Calcutta High Court<sup>4</sup> which held that the words "by a separate suit" cannot be taken to mean "in a separate suit." In view of the fact, however, that the said case of the Calcutta High Court has been overruled by a later Full Bench of that Court,<sup>5</sup> the Madras decisions will have to be reconsidered.

It has been held that a plea that a suit is barred under this Section cannot be raised for the first time in appeal when it has not been raised in the first Court.<sup>6</sup>

**73. "Determined," meaning of.** — The word "determined" shows that the questions contemplated by the Section are to be *finally* disposed of and the effect of the word is therefore to give the Court executing the decree jurisdiction to dispose of finally such questions by granting appropriate relief.<sup>1</sup>

**74. "Court executing the decree," meaning of.** — "The Court executing the decree" means only the Court executing the decree *at the time when the*

('29) AIR 1929 Oudh 309 (310). (Application for withdrawal of money in Court was treated as application for execution.)

('39) AIR 1939 Pat 242 (243). (Decree-holder attaching surplus profits of ghatwal estate raising objections to certain items in the estimate of receipts and expenditure of the estate — Order passed on objections is appealable.)

('23) AIR 1923 Pat 44 (44, 45). (Question of contribution as between defendants in a mortgage suit.)

('38) AIR 1938 Rang 292 (293). (Application under O. 21 R. 22 falls under this Section.)

#### Note 72

1. ('15) AIR 1915 P C 88 (89) (P C).

('33) AIR 1933 Mad 825 (833) : 57 Mad 49. (Section is mandatory—Court has no discretion to refer parties to a suit in respect of a matter falling under the Section.)

('71) 3 N W P H C R 62 (63).

('31) AIR 1931 Bom 114 (118).

('20) AIR 1920 Cal 537 (538).

('01) 28 Cal 492 (495, 496).

('02) 1902 Pun Re No. 8 page 30.

('33) AIR 1933 Mad 340 (341). (Party to suit cannot evade this rule by joining with a stranger.)

('33) AIR 1933 Mad 166 (167) : 56 Mad 447. (When once the Court finds that resort to S. 47 is the proper remedy it has no option but to decide; it cannot refer the parties to a suit.)

('31) AIR 1931 Rang 117 (121) : 9 Rang 305 (FB).

2. ('29) AIR 1929 Cal 374 (379) : 57 Cal 403 (FB). (Overruling 24 Cal 355; 26 Cal 946; 7 C W N 67; 4 Ind Cas 168; AIR 1922 Cal 311. (The decision in AIR 1929 Cal 247 to the contrary must also be considered to be no longer law.)

('27) AIR 1927 Cal 106 (108) : 53 Cal 837.

('32) AIR 1932 All 49 (49).

('31) AIR 1931 Nag 27 (28, 29).

[See also ('11) 10 Ind Cas 90 (93) (Cal).

('10) 7 Ind Cas 457 (458) (Bom). (Judgment-debtor not allowed to raise objection to sale by way of defence to suit.)]

2a. ('32) AIR 1932 Cal 825 (827) : 59 Cal 1242.

('29) AIR 1929 Cal 247 (249) : 56 Cal 467.

3. ('21) AIR 1921 Mad 279 (280).

('09) 1 Ind Cas 221 (222, 226) : 32 Mad 242.

('09) 1 Ind Cas 193 (194) (Mad).

4. ('97) 24 Cal 355 (357).

5. ('29) AIR 1929 Cal 374 (379) : 57 Cal 403 (FB).

6. ('36) 161 Ind Cas 43 (45) (Nag).

#### Note 73

1. ('14) AIR 1914 Mad 91 (93).



*application is made.* Therefore, it does not include the Court which has executed the decree and has thereby become *functus officio*,<sup>1</sup> or an Appellate Court.<sup>2</sup> A Collector executing a decree transferred to him is not a "Court executing a decree" within the meaning of this Section.<sup>3</sup> The Court which sends the decree to the Collector remains "the Court executing the decree" and hence a question coming under this Section can be entertained by such Court even after the decree has been transferred to the Collector for execution.<sup>4</sup> The words "the Court executing the decree" do not restrict the applicability of the Section to proceedings initiated by the decree-holder. The Section also applies to proceedings initiated by the judgment-debtor.<sup>5</sup> See also Note 2 to Section 70, *infra*.

**75. Powers of the executing Court.** — See Notes to Section 38 generally.

**76. Power to construe decree.** — Where there is no ambiguity in the terms of a decree the Court is bound to interpret it according to its plain meaning and cannot ignore its terms or assume mistake on the part of the parties.<sup>1</sup> Where, however, there is any *ambiguity* in the decree, the executing Court may, and should, construe the decree in order to ascertain its precise meaning<sup>2</sup> and, for this purpose, it may refer to the judgment and the pleadings in the case.<sup>3</sup> In construing an appellate decree, the pleadings and the decree of the *trial* Court may be referred to,<sup>4</sup> but not the statements in the judgment of the first Court which are not based on pleadings.<sup>5</sup> See also Note 9 to Section 38, *ante*.

**77. Rules of construction of decree.** — There is no general rule for construing decrees; each case depends on itself.<sup>1</sup> The following general principles may, however, be found useful in interpreting decrees —

1. A decree should be construed in accordance with law.<sup>2</sup> Where, therefore,

#### Note 74

1. ('84) 10 Cal 538 (540).  
(1900) 23 Mad 377 (380). (Includes applications made by the judgment-debtor.)  
(71) 6 Mad II C R 304 (306).
2. ('15) AIR 1915 Mad 41 (41).  
(05) 29 Bom 71 (73).
3. ('25) AIR 1925 All 146 (149) : 47 All 217.  
(38) AIR 1938 Oudh 188 (189).
4. ('38) AIR 1938 Oudh 188 (189).
5. (1900) 23 Mad 377 (380, 382).

#### Note 76

1. ('10) 6 Ind Cas 75 (76) (All).  
(16) AIR 1916 All 207 (208).  
(23) 77 Ind Cas 167 (168, 169) (Cal).  
(18) AIR 1918 Cal 245 (246).  
(17) AIR 1917 Cal 288 (289).
- (30) AIR 1930 Lah 589 (591). (Wording of the decree clear—Decree cannot be interpreted in the light of the reasoning or phraseology in the judgment.)  
(25) AIR 1925 Lah 470 (471).  
(24) AIR 1924 Lah 696 (698).
- (18) AIR 1918 Mad 1287 (1292) : 40 Mad 259 (FB).
2. ('30) AIR 1930 Mad 688 (690) : 53 Mad 750.  
(24) AIR 1924 All 690 (690).  
(07) 9 Bom L R 1361 (1362).  
(87) 16 Bom 659 (661) (F B).
- (84) 10 Cal 1092 (1094). (But where terms of decree are uncertain, any inquiry or evidence in execution to ascertain the same is barred.)

- (30) AIR 1930 Mad 688 (690) : 53 Mad 750.
- (30) AIR 1930 Oudh 302 (303). (The question whether a decree is or is not a purely declaratory decree can only be decided by examination of the decree itself.)  
(98) 1 Oudh Cas 22 (27).
3. ('21) AIR 1921 Cal 699 (700).  
(31) AIR 1931 Cal 511 (513).  
(31) AIR 1931 Mad 328 (331) : 54 Mad 532.  
(35) AIR 1935 Oudh 39 (40, 41) : 10 Luck 416.  
(30) AIR 1930 Oudh 366 (367).  
(30) AIR 1930 Pat 536 (538) : 9 Pat 499.  
(29) AIR 1929 Pat 746 (747).  
(21) AIR 1921 Pat 360 (362).
4. ('20) AIR 1920 Pat 192 (194).
5. ('12) 14 Ind Cas 130 (131) (Oudh).

#### Note 77

1. ('19) AIR 1919 All 297 (298) : 41 All 473.
2. ('11) 12 Ind Cas 123 (126) : 35 Mad 560.  
(21) 65 Ind Cas 224 (224) (Pat).  
(24) AIR 1924 P C 133 (135) : 51 Ind App 236 : 48 Bom 404 (PC). (Decree for possession on payment of a certain amount within a time fixed—Deposit in Court by a mortgagee from the plaintiff—Deposit enures to the benefit of all parties interested in the fulfilment of the condition imposed by the decree.)
- (24) AIR 1924 Cal 778 (778) : 51 Cal 320. (Decree for value of bills of exchange stated in sterling—Decretal amount in rupees is to be calculated as per rate of exchange on the date the bills matured.)

the judgment admits of two meanings, it is wrong to construe it in a way which violates both law and equity.<sup>3</sup>

2. Where the decree is consistent with either of two inconsistent views, that interpretation which is in conformity with the *judgment* should be adopted.<sup>4</sup>

3. A construction which may, in future, result in a multiplicity of suits, should be avoided.<sup>5</sup>

4. A decree must be construed in a fair and reasonable way so as to accelerate its execution<sup>6</sup> and the benefit of the doubt ought to go to the judgment-debtor.<sup>7</sup>

5. In cases of conflicting descriptions of property in the decree, applicable to two different sets of facts, that which is certain, stable, and the least likely to have been mistaken, must prevail.<sup>8</sup>

6. The interpretation to be put upon a consent decree ought to be the same as that to be placed on the original agreement between the parties.<sup>9</sup>

6a. Similarly a decree passed on the basis of an award should be construed in the light of the award.<sup>9a</sup>

7. Where a decree is passed in favour of A conditional on his paying into Court a certain sum of money "within 30 days of the decree becoming final," a payment made within the time extended by Section 12 of the Limitation Act, but after the expiry of 30 days from the decree, is within time.<sup>10</sup> Similarly, where the decree directs A to pay a certain sum to another within a certain time as a condition precedent to recovery of possession, the payment made within the same period from the date of the *appellate* decree is valid.<sup>11</sup>

8. A direction that the defendant "do pay a certain sum of money" imposes *prima facie* a personal liability on the defendant,<sup>12</sup> though, no doubt, the words are not conclusive of the question.<sup>12a</sup>

9. A decree must be construed as a whole.<sup>13</sup>

#### 78. Power to go behind decree. — See Note 8 to Section 38 and Note 29 *ante*.

('21) AIR 1921 Lah 42 (43) : 2 Lah 155. (Possession to be given in case of default—Option not limited to first default.)

('23) AIR 1923 Oudh 241 (241) : 26 Oudh Cas 59. (When under a decree, the contractual rate of interest ceases to be payable at a given date and the court rate is substituted for it therefrom up to the date of realization, the court rate will be chargeable on the whole amount due with interest at the contractual rate up to that given date.)

('21) AIR 1921 Oudh 108 (109, 110) : 24 Oudh Cas 209. (Where a decree awarded mesne profits but did not specify that they were future profits the decree must be intended to give with possession those mesne profits claimable by law up to the time of possession.)

('12) 16 Ind Cas 866 (866) (Oudh). (Do.)

('36) AIR 1936 Pat 303 (305). (Decree against puisne mortgagee in suit by prior mortgagee not to be interpreted to be a personal decree against the puisne mortgagee.)

3. ('21) 60 Ind Cas 345 (346) (Lah).

4. ('10) 5 Ind Cas 496 (496) : 32 All 321.

('13) 20 Ind Cas 827 (828) (Mad).

('23) AIR 1923 Cal 704 (704).

('17) AIR 1917 Cal 288 (289).

5. ('22) AIR 1922 Oudh 34 (36).

('30) AIR 1930 Oudh 302 (303).

6. ('20) AIR 1920 Pat 192 (193).

('33) AIR 1933 Cal 329 (331) : 60 Cal 794. (Court will lean against a construction which renders a decree inexecutable.)

[See also ('31) AIR 1931 Cal 476 (478).]

7. ('21) AIR 1921 Oudh 138 (138).

8. ('14) AIR 1914 Oudh 280 (281) : 17 Oudh Cas 256.

9. ('11) 9 Ind Cas 875 (880) (Mad).

9a. ('33) AIR 1933 Lah 505 (506).

('31) AIR 1931 Cal 511 (513).

10. ('17) AIR 1917 All 325 (325) : 39 All 193.

11. ('14) AIR 1914 Bom 132 (134) : 39 Bom 175.

12. ('11) 12 Ind Cas 689 (690) (Mad).

('11) 12 Ind Cas 184 (185) (Mad).

('29) AIR 1929 Mad 105 (108, 109) : 52 Mad 263. (Costs decreed against Official Receiver—Personally liable.)

12a. ('11) 12 Ind Cas 689 (689) (Mad).

('34) AIR 1934 Oudh 45 (47). (Benefit of doubt to be given to judgment-debtor.)

13. ('29) AIR 1929 Sind 98 (101) : 23 Sind LR 375.

mistake in the initiation of proceedings<sup>2</sup> and to avoid a valid claim being defeated on technical pleas.<sup>2a</sup> See also the undermentioned case.<sup>2b</sup> But it is not intended to save litigants from the trouble of choosing the proper forum and filing a plaint or an execution petition when it is discovered, in time, what is the proper forum and there is no further question about the matter.<sup>2c</sup> A proceeding cannot, however, be treated *both* as a suit as well as an application.<sup>3</sup>

The power under this Section is *discretionary* and may be exercised according to the circumstances of each case.<sup>4</sup> But two essential conditions must be satisfied before the Court can exercise its discretion and treat a suit as an application —

1. The Court in which the suit is brought must have *jurisdiction to execute the decree*,<sup>5</sup> and

('12) 13 Ind Cas 204 (205) (Mad).  
 ('10) 6 Ind Cas 776 (776) (Mad).  
 ('09) 1 Ind Cas 380 (381) (Mad).  
 ('23) AIR 1923 Nag 94 (95).  
 ('30) AIR 1930 Oudh 468 (470).  
 ('38) AIR 1938 Pat 216 (220).  
 ('36) AIR 1936 Pat 303 (305).  
 ('16) AIR 1916 Pat 299 (300) : 1 Pat L Jour 48.  
 [See also ('03) 5 Bom L R 1036 (1041).]  
 2. ('15) AIR 1915 Mad 226 (227).  
 ('31) AIR 1931 Mad 588 (590).  
 2a. ('23) AIR 1923 Nag 94 (95).  
 2b. ('36) AIR 1936 Bom 227(231): 60 Bom 516.  
 2c. ('31) AIR 1931 Mad 270 (271).  
 3. ('15) AIR 1915 Mad 226 (227).  
 4. *In the following cases suits were in the discretion of the Court allowed to be treated as proceedings :—*  
 ('07) 29 All 348 (350, 351).  
 (1900) 22 All 121 (123).  
 ('38) AIR 1938 Cal 113 (115) : I L R (1938) 1 Cal 280.  
 ('35) AIR 1935 Cal 15 (17). (Suit for setting aside court sale in respect of properties not included in the mortgage.)  
 ('27) AIR 1927 Cal 614 (615): 54 Cal 419. (Purchaser in execution of mortgage-decree — Title questioned—Application under S. 47 and not suit is the remedy—Suit can be treated as a proceeding.)  
 ('05) 32 Cal 332 (333).  
 ('19) AIR 1919 Lah 430 (431, 432).  
 ('07) 1907 Pun Re No. 5, p. 30.  
 ('32) 35 Mad L W 103 (104). (Dismissal of prior execution petition is no bar for treating suit as proceeding.)  
 ('30) AIR 1930 Mad 12 (13, 14).  
 ('16) AIR 1916 Mad 429 (429).  
 ('14) AIR 1914 Mad 91 (92).  
 ('10) 6 Ind Cas 776 (776) (Mad). (Where a suit is barred under S. 244, Civil P. C., the plaint may be treated as an application under that Section.)  
 ('09) 1 Ind Cas 380 (381) (Mad). (Plaint covering a question under S. 47, Civil P. C., may be treated as an execution petition.)  
 ('22) AIR 1922 Nag 198 (199). (Suit for restitution which is barred under S. 144.)  
 [See ('16) AIR 1916 Pat 299 (300): 1 Pat L Jour 43.]

*In the following cases, a proceeding was allowed to be treated as a suit :—*

(26) AIR 1926 All 387 (388): 48 All 362. (Decree against a minor—Objection by the minor that the decree was not binding on him in execution proceedings by an application — Proceeding on the objection may be treated as suit.)  
 ('12) 16 Ind Cas 543 (545) (Cal). (Do.)  
 ('38) AIR 1938 Lah 177 (178). (Partition proceedings—Award declaring rights of parties without giving possession—Decree on award — Application for execution claiming possession with alternative prayer to treat application as a suit.)  
 ('13) 18 Ind Cas 700 (700) (Lah).  
 ('31) AIR 1931 Mad 81 (83).  
 ('25) AIR 1925 Pat 16 (17): 3 Pat 344. (Proceedings in execution between rival assignees of decree regarded by Court as suit.)  
*In the following cases the Court refused to act under the Section :—*  
 ('13) 19 Ind Cas 622 (623, 624): 35 All 243.  
 ('09) 3 Ind Cas 495 (496) (All).  
 ('04) 1 All L Jour 61 (63).  
 (1900) 1900 All W N 196 (197).  
 ('19) AIR 1919 Cal 674 (676): 46 Cal 103.  
 ('24) AIR 1924 Mad 707 (708).  
 ('09) 4 Ind Cas 723 (724): 32 Mad 425.  
 ('31) AIR 1931 Oudh 45 (46): 6 Luck 452.  
 ('15) AIR 1915 Oudh 134 (135, 136).  
 5. ('10) 7 Ind Cas 55 (59) (Cal).  
 ('34) AIR 1934 All 699 (700). (Party to suit in Small Cause Court objecting to attachment of property in execution of decree in same Court—Objection dismissed and declaratory suit filed in Munsif's Court — Munsif's Court cannot treat suit as application under S. 47 and suit must be dismissed.)  
 ('16) AIR 1916 All 184 (186).  
 ('14) AIR 1914 Cal 691 (692).  
 ('95) 22 Cal 483 (486).  
 ('26) AIR 1926 Lah 165 (166): 7 Lah 1.  
 ('35) AIR 1935 Mad 923 (925).  
 ('20) AIR 1920 Mad 206 (207).  
 ('09) 4 Ind Cas 723 (724) : 32 Mad 425.  
 ('05) 28 Mad 64 (66).  
 ('99) 22 Mad 347 (349).  
 ('22) AIR 1922 Nag 189 (191).  
 ('21) AIR 1921 Nag 130 (131).  
 ('18) AIR 1918 Nag 102 (103).  
 ('95) 8 O P L R 3 (4).

2. the application should not have been barred by limitation at the date of the institution of the suit.<sup>6</sup>

The power exercisable under this sub-section may not only be exercised by the original Court, but also by the Appellate Court, subject, however, to the same two conditions, namely, that the original Court had jurisdiction to execute the decree<sup>7</sup> and that the suit was filed within the limitation period prescribed for applying under this Section.<sup>8</sup>

The discretion given under this sub-section must be exercised when the plaint or application is filed, and after the procedure has once been determined at that stage (subject to the usual control of an appellate or revisional Court) it cannot thereafter be altered.<sup>9a</sup> Hence, it has been held that where a claim suit has been filed and has proceeded to its conclusion, a Court in which an application for execution is subsequently filed cannot treat such suit as an *application* to take a step-in-aid of execution for the purpose of saving limitation in respect of the subsequent execution application.<sup>9b</sup>

Where an application falling under this Section is dismissed on the merits and the applicant then brings a suit for the same relief, the suit cannot be converted into an application under this Section, on its being contended that such suit is barred by this Section. The remedy of the aggrieved party was to have appealed against the decision dismissing his prior application.<sup>9c</sup>

Where a proceeding in execution is treated, under this Section, as a suit, the judgment-debtor who objects to the execution of the decree is in the position of a plaintiff and therefore he has to pay the court-fee due to the Government in respect of the suit.<sup>9</sup>

**83. Objection as to limitation, when to be considered.** — An objection as to limitation may be taken at any stage of the execution proceedings if the facts upon which the objection is based are patent upon the face of the record.<sup>1</sup>

See also Note 23 to Section 11.

**84. Appeal.** — Where an order amounts to a determination of a question between the parties and relating to the execution, discharge or satisfaction of the decree, it will be a decree within the meaning of Section 2 cl. (2) and is appealable as such under Section 96.<sup>1</sup> As to whether *every* such order is appealable, see Note 86,

('11) 10 Ind Cas 991 (992) : (1910) 1 Upp Bur Rul 66.

6. (1900) 22 All 376 (377).

('11) 11 Ind Cas 987 (989) : 35 Bom 452.

('27) AIR 1927 Cal 106 (108) : 53 Cal 837.

('11) 10 Ind Cas 417 (420) (Cal).

('37) AIR 1937 Mad 580 (580).

('25) AIR 1925 Mad 1198 (1200).

('18) AIR 1918 Mad 180 (182).

('17) AIR 1917 Mad 453 (453).

('30) AIR 1930 Oudh 468 (470). (Plaint treated as an execution application and as an application to take a step-in-aid.)

[See ('38) AIR 1938 Nag 534 (536).]

[But see ('21) AIR 1921 Bom 285 (289) : 45 Bom 174. (Suit was treated as application to set aside sale and application was held time barred.)]

7. ('95) 22 Cal 483 (485, 486).

[See ('05) 32 Cal 332 (336).]

(1900) 22 All 376 (377).

('27) AIR 1927 Cal 411 (411, 412) : 54 Cal 524.

('27) AIR 1927 Cal 106 (108) : 53 Cal 837.

('05) 28 Mad 64 (66).

8a. ('38) AIR 1938 Nag 534 (536).

8b. ('38) AIR 1938 Nag 534 (536).

8c. ('35) AIR 1935 Mad 923 (925).

9. ('34) AIR 1934 Pat 9 (11).

#### Note 83

1. ('16) AIR 1916 Pat 331 (333).

('35) AIR 1935 Cal 230 (231).

#### Note 84

1. ('12) 13 Ind Cas 365 (367) (Cal).

('33) AIR 1933 All 732 (733) : 55 All 983. (Order dismissing execution application is appealable.)

('36) AIR 1936 All 479 (480). (A decision that certain person is representative of the judgment-debtor is appealable.)

('35) AIR 1935 All 183 (184).

The question of the right to appeal under this Section does not depend upon who happens to be the appellant but upon the question whether or not the case falls within the Section; thus, if the conditions of the Section are satisfied, the auction-purchaser also will have a right to appeal.<sup>2</sup>

Where a decree of a Small Cause Court is sent for execution to a Court exercising original jurisdiction and an order is passed under this Section, such an order is appealable.<sup>3</sup> But no *second appeal* will lie against an order in execution under this Section, where the suit is of a nature cognisable by a Court of Small Causes.<sup>4</sup> In the case of arbitration proceedings, the award must be considered to be a decree in a suit

(193) AIR 1933 All 201 (202) : 55 All 235. (Decree for possession—Decision on question between decree-holder and transferee pendente lite from judgment-debtor as to right to possession is a decree.)

(193) AIR 1933 All 57 (59) : 54 All 1031. (Decision on question under O. 21 R. 98 between plaintiff and exonerated defendant appealable as a decree.)

(193) AIR 1932 All 49 (49). (Even if order is not strictly within S. 47 if Judge purports to act under this Section, it would be appealable.)

(194) AIR 1924 Mad 518 (519). (Do.)

(195) 23 Mad 127 (129). (Do.)

(195) AIR 1925 All 551 (552).

(196) AIR 1938 Cal 236 (237).

(196) AIR 1939 Cal 334 (335). (Order purporting to be one under S. 151 but one which ought to be made under S. 47—Appeal lies.)

(197) AIR 1937 Cal 259 (259) : I L R (1937) 2 Cal 137. (Order dismissing execution petition for failure to comply with directions of Court—Second appeal lies.)

(198) AIR 1925 Cal 318 (319).

(198) AIR 1918 Cal 551 (552). (Such an order passed even on review is appealable as a decree.)

(199) 5 Ind Cas 483 (484) (Cal). (Do.)

(199) AIR 1915 Cal 137 (138).

(199) 20 Ind Cas 874 (875, 876) (Cal). (Question of agreement to give time to judgment-debtor for delivery of possession after court-sale.)

(199) 8 Ind Cas 4 (5) (Cal).

(199) 7 Ind Cas 769 (771) (Cal).

(199) 8 South W R 398 (398).

(199) 41 Pun L R 186 (187). (Appeal lies from an order transferring decree to another Court for execution, as the order is one relating to the execution though it is itself not an order executing the decree.)

(199) AIR 1936 Lah 725 (727). (Though application purports to be under S. 151, the order is under this Section and appeal lies.)

(199) AIR 1929 Lah 884 (885). (If the order is under S. 151 it is not appealable.)

(199) AIR 1914 Lah 9 (11) : 20 Ind Cas 203 (205) : 1914 Pun Re No. 10. (Do.)

(199) 19 Ind Cas 489 (489) (Lah). (Do.)

(199) AIR 1929 Pat 391 (392). (Do.)

(199) AIR 1927 Lah 651 (652). (Executing Court—No power to amend decree—If it amends, appeal under S. 47 lies.)

(199) 2 Mad L Tim 307 (307). (Do.)

(199) AIR 1915 Lah 100 (102). (However, if the decree is one under S. 9, Specific Relief Act, no

appeal lies.)

(197) AIR 1937 Mad 509 (511) : I L R (1937) Mad 834. (Even though matter does not fall under this Section, if the order purports to be made under this Section appeal lies.)

(196) AIR 1936 Mad 812 (814). (Order refusing application of judgment-debtor to raise attachment is appealable—The fact that order is passed on a separate application by judgment-debtor and not on the execution petition itself does not make any difference.)

(196) AIR 1936 Mad 636 (638). (Though purporting to have been passed under S. 151.)

(195) AIR 1935 Mad 340 (341). (Order recording satisfaction of decree is appealable—Such order cannot be set aside by executing Court.)

(197) AIR 1927 Mad 842 (843).

(198) 19 Ind Cas 448 (448) (Mad). (Substance of the order must be looked at if provision of law quoted is not decisive.)

(198) AIR 1934 Nag 201 (203) : 13 Nag L R 240. (Question not between parties or representatives—No appeal lies.)

(199) 15 C P L R 69 (72).

(199) 4 C P L R 132 (133).

(196) AIR 1936 Oudh 50 (51) : 11 Luck 519. (Decree discharged as satisfied—Discharge amounts to a decree.)

(199) AIR 1929 Pat 472 (472).

(199) AIR 1929 Pat 141 (142) : 8 Pat 717.

(197) AIR 1937 Pesh 3 (4). (Order by trial Court refusing to allow costs directed to be paid by Privy Council, has force of decree and is appealable.)

(198) AIR 1928 Rang 40 (41) : 5 Rang 775. (Refusal to decide objections as to executability—Decree appealable.)

(193-1900) 1893-1900 Low Bur Rul 375.

[But see (77) 2 Bom 553 (556, 557). (Case under Code of 1859. Order as to amount of mesne profits not a decree—Not good law now.)]

2. (199) 26 Cal 539 (541, 542).

3. (196) 11 Cal W N 861 (862).

(197) AIR 1917 All 304 (304) : 39 All 357. (Small Cause Court having ceased to exist.)

4. (1911) 10 Ind Cas 412 (413) (Cal).

(1900) 27 Cal 484 (487).

(1921) AIR 1921 All 55 (55) : 43 All 403.

(1907) 30 Mad 212 (213).

(197) AIR 1937 Pat 349 (351).

and therefore an appeal would lie against an order in execution of an award.<sup>5</sup> Where a decree is obtained in a suit brought under Section 9 of the Specific Relief Act and an order is passed in proceedings in execution of that decree, no appeal lies against that order.<sup>6a</sup> The reason is that Section 9 of that Act provides that "no appeal shall lie from any order or decree passed in any suit under this Section" and applications for execution of decrees are proceedings in suit.

Where a judgment-debtor or a party to the suit objects to the attachment and sale of his properties in execution, or in other words prefers a claim, an order deciding such a claim falls within this Section and is appealable as a decree under Section 96 read with Section 2 clause (2).<sup>6</sup> The words '*as if he was a party to the suit*' in O. 21, R. 58 show that a claim by a party to the suit is not within the scope of that Rule. Even if the matter comes within O. 21 R. 58, still a right of appeal under Section 96 cannot be taken away by any provision, such as O. 21 R. 63, which is not contained in the body of the Code. (Compare the words "provided in the body of this Code" in Section 96 with the words "provided in this Code" in Sections 141, 146 and 148.)

Section 2 clause (2) excludes from the definition of decree any adjudication from which an appeal lies as an appeal from an order. Thus an order appointing a receiver in execution under O. 40 R. 1 is appealable under O. 43 R. 1 (s) and is not a decree appealable under Section 96.<sup>7</sup> As to appeals from orders passed under O. 21, Rr. 89, 90 and 91, see those Rules.

Appeals from orders under this Section are expressly excepted from the provisions of Article 1 of Schedule I of the Court-fees Act by notifications of the various Local Governments under Section 35 of the Court-fees Act and consequently *ad valorem* fee is not payable in respect of such appeals.<sup>8</sup> It has been held that an order

5. ('21) AIR 1921 Sind 132 (133) : 16 Sind L R 245.  
( '29) AIR 1929 Lah 228 (229).  
( '34) AIR 1934 Lah 49 (50). (Proceedings for enforcement of award are governed by S. 47—Appeal lies from order rejecting application for enforcement.)
- 5a. ('18) AIR 1918 Cal 925 (926) : 45 Cal 519.  
( '32) AIR 1932 Lah 416 (416) : 13 Lah 798.  
( '28) AIR 1928 Lah 539 (539).  
( '08) 26 Mad 438 (439).
6. ('16) AIR 1916 Cal 814 (814).  
( '21) AIR 1921 Cal 242 (244).  
( '12) 16 Ind Cas 385 (386) (Cal).  
( '32) AIR 1932 Lah 376 (376). (Even though claim is wrongly described as one under O. 21, R. 58.)  
( '24) AIR 1924 Lah 589 (590). (Do.)  
( '27) AIR 1927 Lah 895 (896).  
( '35) AIR 1935 Mad 923 (924). (Even if Court treats the application as one under O. 21 R. 58 and refers claimant to a suit, appeal is the remedy and not a suit.)  
( '34) AIR 1934 Mad 435 (435) : 57 Mad 822. (Joint claim by party to suit and by stranger—Appeal by party and suit under O. 21 R. 63 by stranger.)  
( '21) AIR 1921 Mad 627 (628). (Question under O. 21 R. 97.)  
( '21) AIR 1921 Mad 612 (614, 615). (Question under O. 21 R. 100, fought out by parties to the suit—Appealable.)
- ( '20) AIR 1920 Mad 126 (128) : 48 Mad 696. (Same principle applies to claims under O. 21, R. 103.)  
( '16) AIR 1916 Mad 727 (727). (Objection by judgment-debtor to sale.)  
( '13) 21 Ind Cas 748 (749) (Mad).  
( '94) 17 Mad 399 (400).  
( '29) AIR 1929 Oudh 21 (21). (Claim by a party must be decided on the merits and not rejected without enquiry.)  
( '36) AIR 1936 Pat 268 (270).  
( '31) AIR 1931 Pat 97 (98).  
( '31) AIR 1931 Rang 314 (316). (Though it is misdescribed as one under O. 21 R. 58.)  
[See ('17) AIR 1917 Bom 133 (134) : 42 Bom 10.]  
[But see ('20) AIR 1920 Mad 206 (207). (Obiter).]
7. ('29) AIR 1929 Mad 20 (21).  
[But see ('28) 1928 Mad W N 390 (390). (Order appointing receiver in execution—Second Appeal lies.)]
8. ('30) AIR 1930 Lah 24 (25). (S. 35 of the Court-fees Act was amended by Act 38 of 1920 by which Local Governments were empowered to issue notifications.)  
( '37) AIR 1937 Cal 152 (155) : 1 L R (1937) 1 Cal 637. (By notification of Government of India in force in Bengal the fee chargeable on appeals from orders under S. 47 was limited to amount chargeable under Art. 11 of Sch. II, Court-fees Act.)  
( '36) AIR 1936 Rang 352 (353).  
[See also ('38) AIR 1938 Bom 320 (321).]

under O. 21 R. 50 clauses 2 and 3 is not an order under this Section and that on an appeal from such an order *ad valorem* court-fee is payable.<sup>8a</sup> The Court can require a person appealing from an order under this Section to give security for the costs of the appeal.<sup>9</sup>

See also the undermentioned cases.<sup>10</sup>

**85. Forum of appeal.**—The value of the original suit in which the execution is taken out determines the *forum* of appeal in respect of an order passed in execution proceedings. The actual value of the subject-matter in dispute involved in the order is not the criterion.<sup>1</sup> See Note 18 to Section 96 as to the value of appeal for the purposes of jurisdiction.

**86. Interlocutory orders in execution proceedings.**—The phrase “determination of any question within Section 47” in Section 2 cl. (2) does not make every decision of any question within this Section, a decree. In order to be appealable as a decree, the decision must also have the essential characteristics of a decree as defined in that Section, that is, it must also be the formal expression of an adjudication conclusively determining the *rights* of the parties. If not, the order is merely an *interlocutory* one and is not appealable as a decree.<sup>1</sup> Otherwise “every interlocutory order in an execution proceeding, such as an order granting or refusing process for the examination of witnesses, would be appealable; and far greater latitude would be given

8a. ('39) AIR 1939 Sind 161 (163) (F B). (AIR 1929 Bom 386, Foll.)

9. (1900) 24 Bom 314 (316).

10. ('37) AIR 1937 Pat 380 (381). (Question whether appeal lies against order of Subordinate Court can arise only if order is passed by the Subordinate Court suo motu as a Court of execution and not when order is passed on a direction from the Appellate Court.)

('34) AIR 1934 Pesh 43 (44). (Decree removing Mahant from office—Application for appointing Committee to appoint Mahant—Order thereon—Appeal held not to lie.)

('37) AIR 1937 Pesh 3 (4). (S. 47 applies to execution of decrees of Privy Council — Copy of judgment passed by Court executing decree and presented with memo of appeal should be stamped with a stamp of Re. 1 under Art. 7, Court-Fees Act.)

#### Note 85

1. ('15) AIR 1915 All 349 (349).

('25) AIR 1925 Cal 212 (212).

('19) AIR 1919 Lah 275 (276): 1919 Pun Re No. 44.

#### Note 86

1. ('24) AIR 1924 All 808 (811): 46 All 733.

('33) AIR 1933 Mad 500 (500). (Order overruling preliminary objections by judgment-debtor.)

('11) 11 Ind Cas 545 (545): 38 Cal 717: 6 Low Bur Rul 26: 38 Ind App 126 (P C). (Order refusing leave to bid to a decree-holder under O. 21, R. 72 is only administrative order.)

('35) AIR 1935 All 502 (503). (Order striking off objection for default.)

('32) AIR 1932 All 136 (137).

('31) AIR 1931 All 765 (765). (Order of District Judge approving appointment of a trustee made by committee under a scheme decree — Not a decree.)

31) AIR 1931 All 129 (130, 131). (Order directing

execution against one set of defendants in the first instance—Not a decree.)

('30) AIR 1930 All 638 (639).

('29) AIR 1929 All 390 (391, 392). (Ex parte order under O. 21 R. 50 (2) granting leave to execute — Not a decree.)

('29) AIR 1929 Bom 386 (388): 53 Bom 839. (Do.)

('29) AIR 1929 All 85 (85). (Order refusing stay of sale.)

('24) AIR 1924 Lah 671 (672). (Do.)

('24) AIR 1924 Mad 234 (235). (Do.)

('27) AIR 1927 All 208 (209).

('26) AIR 1926 All 401 (401).

('26) AIR 1926 All 268 (268, 269): 48 All 260.

('25) AIR 1925 All 588 (589): 47 All 543. (Order directing enquiry into mesne profits.)

('24) AIR 1924 All 794 (795). (Order refusing to restore an execution application dismissed for default.)

('28) AIR 1928 Oudh 329 (330). (Do.)

('12) 15 Ind Cas 50 (51): 34 All 530. (Order holding that fresh attachment is not necessary.)

('90) 1890 All W N 85 (86). (Order for recovery of deficiency of price against defaulting purchaser — Not a decree—Not appealable.)

('87) 9 All 500 (503, 504). (Order allowing a payment directed by the decree to be made.)

('19) AIR 1919 Cal 806 (807). (Do.)

('31) AIR 1931 Bom 391 (393, 396): 55 Bom 414. (Scheme decree with liberty to apply for modification—Order on such application—Not appealable.)

('31) AIR 1931 Bom 388 (390). (Order of District Judge as persona designata under a scheme — Not appealable.)

('84) 8 Bom 287 (295).

('31) AIR 1931 Cal 574 (576): 58 Cal 808. (Order under O. 21 R. 99 is not one under S. 47.)

('25) AIR 1925 Cal 679 (680, 681). (Order solely relating to jurisdiction.)

of appealing against orders in such proceedings than is allowed as against orders made in suits before decree—a thing which could hardly have been intended.”<sup>2</sup> But though an order may be interlocutory, if it is one which in *substance* determines a question relating to execution between the decree-holder and the judgment-debtor as, for instance, where it has the effect of reviving an application for execution which was dismissed for default of the decree-holder, especially when a fresh application would be barred by limitation, it will be appealable as a decree.<sup>3</sup> The decision that the executing Court had power to hear the objection application of the judgment-debtor under Section 47 is an order which determines a very important and substantial right and hence is appealable as a decree.<sup>4</sup> As regards the appealability of an order fixing the value of property for the purposes of sale, see O. 21 R. 66. As regards appeals against orders granting or refusing stay of execution, see Note 44, *ante*.

**86a. Parties to proceedings under Section.** — The auction-purchaser is not a necessary party to a proceeding under this Section as between the parties to the suit; nor is his non-joinder in an appeal from an order in such proceedings fatal to it.<sup>1</sup>

**87. Revision.** — An order which is appealable under this Section<sup>1a</sup> or in which there is no question of jurisdiction involved, is not open to revision.<sup>1</sup> In the case of an order not open to appeal, a revision may lie if the conditions of Section 115 are satisfied.<sup>2</sup>

- (‘19) AIR 1919 Pat 383 (383): 4 Pat L Jour 461. (Do.)  
 (‘19) AIR 1919 Cal 471 (472). (Order accepting security under O. 41 R. 5.)  
 (‘81) AIR 1931 Mad 38 (38) : 54 Mad 237. (Do.)  
 (‘12) 13 Ind Cas 170 (170) (Cal).  
 (1900) 7 Cal L Jour 436 (437, 438). (Order refusing grant of sale certificate to decree-holder auction-purchaser.)  
 (‘91) 18 Cal 469 (472). (Order on a preliminary point of law.)  
 (‘20) AIR 1920 Lah 117 (118). (Do.)  
 (‘73) 19 Suth W R 90 (91). (Relating to procedure.)  
 (‘29) AIR 1929 Lah 815 (816). (Do.)  
 (‘30) AIR 1930 Lah 20 (22) : 11 Lah 93. (An order restoring an execution application which had been dismissed for default.)  
 (‘32) AIR 1932 Lah 120 (121). (Order accepting or refusing to accept security, not appealable.)  
 (‘29) AIR 1929 Lah 391 (392). (Administrative order not appealable.)  
 (‘27) AIR 1927 Lah 527 (528). (Order rejecting security and ordering execution to continue.)  
 (‘27) AIR 1927 Lah 337 (337). (Order setting aside sale after confirmation—S. 47 does not apply.)  
 (‘86) 1886 Pun Re No. 55, p. 116.  
 (‘36) AIR 1936 Mad 623 (624). (Order allowing amendment to execution petition is not a decree.)  
 (‘33) AIR 1933 Mad 500 (500).  
 (‘30) AIR 1930 Mad 918 (918, 921) : 54 Mad 315. (Order filling up vacancy in the office of trustee appointed under a scheme—Not covered by S. 47.)  
 (‘29) AIR 1929 Mad 718 (720). (Order under O. 21 R. 22 for arrest and notice at the same time.)  
 (‘36) AIR 1936 Oudh 369 (370). (Order accepting security tendered by judgment-debtor and directing stay of execution.)  
 (‘38) AIR 1938 Pat 216 (220).  
 (‘37) AIR 1937 Rang 157 (159). (Final decree for sale in mortgage suit — Order by District Court

in execution directing sale of properties outside district — Order is not appealable as it does not affect the question as to the liability of the properties to be sold.)

(‘27) AIR 1927 Rang 317 (317) : 5 Rang 534 : 5 Rang 641. (Order requiring security before drawing out money.)

(‘25) AIR 1925 Rang 271 (273) : 3 Rang 132.

[See (‘02) 29 Cal 622 (625). (Order determining principle for ascertainment of mesne profits held not interlocutory.)]

[But see (‘32) AIR 1932 All 85 (89) : 53 All 391. (Order prescribing the order of sale of mortgaged properties falls under S. 47—Appealable.)

(‘16) AIR 1916 Cal 471 (472). (Question as to benami transfer of decree governed by the Section.)]

2. (‘97) 24 Cal 725 (739) (F B). (Per Banerji, J.)  
 (‘14) AIR 1914 Cal 149 (149) : 20 Ind Cas 72 (72) : 41 Cal 160.

(‘11) 12 Ind Cas 745 (749, 750) (Cal).

(‘11) 10 Ind Cas 371 (371, 372) (Cal).

(‘09) 2 Ind Cas 338 (341) : 36 Cal 422. (The propriety of such interlocutory orders can be attacked in the appeal from the final order.)

3. (‘20) AIR 1920 Cal 534 (535).

4. (‘39) AIR 1939 Lah 177 (178).

#### Note 86a

1. (‘39) AIR 1939 Nag 183 (186).

#### Note 87

1a. (‘29) AIR 1929 Pat 141 (142) : 8 Pat 717.

1. (1900) 2 Bom L R 887 (888).

(‘33) AIR 1933 Bom 185 (186).

(‘36) AIR 1936 All 479 (480).

(‘31) AIR 1931 All 765 (766).

(‘05) 32 Cal 572 (575). (Only an error of law.)

(‘32) AIR 1932 Lah 96 (97). (Order under S. 73—No revision—Practice of Lahore High Court.)

2. (‘28) AIR 1928 Lah 811 (812).



of appealing against orders in such proceedings than is allowed as against orders made in suits before decree—a thing which could hardly have been intended.”<sup>2</sup> But though an order may be interlocutory, if it is one which in *substance* determines a question relating to execution between the decree-holder and the judgment-debtor as, for instance, where it has the effect of reviving an application for execution which was dismissed for default of the decree-holder, especially when a fresh application would be barred by limitation, it will be appealable as a decree.<sup>3</sup> The decision that the executing Court had power to hear the objection application of the judgment-debtor under Section 47 is an order which determines a very important and substantial right and hence is appealable as a decree.<sup>4</sup> As regards the appealability of an order fixing the value of property for the purposes of sale, see O. 21 R. 66. As regards appeals against orders granting or refusing stay of execution, see Note 44, *ante*.

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- (‘19) AIR 1919 Pat 383 (383): 4 Pat L Jour 461. (Do.)
- (‘19) AIR 1919 Cal 471 (472). (Order accepting security under O. 41 R. 5.)
- (‘31) AIR 1931 Mad 38 (38) : 54 Mad 237. (Do.)
- (‘12) 13 Ind Cas 170 (170) (Cal).
- (1900) 7 Cal L Jour 436 (437, 438). (Order refusing grant of sale certificate to decree-holder auction-purchaser.)
- (‘91) 18 Cal 469 (472). (Order on a preliminary point of law.)
- (‘20) AIR 1920 Lah 117 (118). (Do.)
- (‘73) 19 Suth W R 90 (91). (Relating to procedure.)
- (‘29) AIR 1929 Lah 815 (816). (Do.)
- (‘30) AIR 1930 Lah 20 (22) : 11 Lah 93. (An order restoring an execution application which had been dismissed for default.)
- (‘32) AIR 1932 Lah 120 (121). (Order accepting or refusing to accept security, not appealable.)
- (‘29) AIR 1929 Lah 391 (392). (Administrative order not appealable.)
- (‘27) AIR 1927 Lah 527 (528). (Order rejecting security and ordering execution to continue.)
- (‘27) AIR 1927 Lah 337 (337). (Order setting aside sale after confirmation—S. 47 does not apply.)
- (‘86) 1886 Pun Re No. 55, p. 116.
- (‘36) AIR 1936 Mad 623 (624). (Order allowing amendment to execution petition is not a decree.)
- (‘33) AIR 1933 Mad 500 (500).
- (‘30) AIR 1930 Mad 918 (918, 921) : 54 Mad 315. (Order filling up vacancy in the office of trustee appointed under a scheme—Not covered by S. 47.)
- (‘29) AIR 1929 Mad 718 (720). (Order under O. 21 R. 22 for arrest and notice at the same time.)
- (‘36) AIR 1936 Oudh 369 (370). (Order accepting security tendered by judgment-debtor and directing stay of execution.)
- (‘38) AIR 1938 Pat 216 (220).
- (‘37) AIR 1937 Rang 157 (159). (Final decree for sale in mortgage suit — Order by District Court

- in execution directing sale of properties outside district — Order is not appealable as it does not affect the question as to the liability of the properties to be sold.)
- (‘27) AIR 1927 Rang 317 (317) : 5 Rang 534 : 5 Rang 641. (Order requiring security before drawing out money.)
- (‘25) AIR 1925 Rang 271 (273) : 3 Rang 132. [See (‘02) 29 Cal 622 (625). (Order determining principle for ascertainment of mesne profits held not interlocutory.)]
- [But see (‘32) AIR 1932 All 85 (89) : 53 All 391. (Order prescribing the order of sale of mortgaged properties falls under S. 47—Appealable.)
- (‘16) AIR 1916 Cal 471 (472). (Question as to benami transfer of decree governed by the Section.)]
- 2. (‘97) 24 Cal 725 (739) (F B). (Per Banerji, J.)
- (‘14) AIR 1914 Cal 149 (149) : 20 Ind Cas 72 (72) : 41 Cal 160.
- (‘11) 12 Ind Cas 745 (749, 750) (Cal).
- (‘11) 10 Ind Cas 371 (371, 372) (Cal).
- (‘09) 2 Ind Cas 338 (341) : 36 Cal 422. (The propriety of such interlocutory orders can be attacked in the appeal from the final order.)
- 3. (‘20) AIR 1920 Cal 534 (535).
- 4. (‘39) AIR 1939 Lah 177 (178).

#### Note 86a

- 1. (‘39) AIR 1939 Nag 183 (186).

#### Note 87

- 1a. (‘29) AIR 1929 Pat 141 (142) : 8 Pat 717.
- 1. (1900) 2 Bom L R 887 (888).
- (‘33) AIR 1933 Bom 185 (186).
- (‘36) AIR 1936 All 479 (480).
- (‘31) AIR 1931 All 765 (766).
- (‘05) 32 Cal 572 (575). (Only an error of law.)
- (‘32) AIR 1932 Lah 96 (97). (Order under S. 73—No revision—Practice of Lahore High Court.)
- 2. (‘28) AIR 1928 Lah 811 (812).

## LIMIT OF TIME FOR EXECUTION

**48.** [S. 230, paras. 3 and 4.] (1) Where an application to execute a decree<sup>4</sup> not being a decree granting an injunction<sup>2</sup> has been made,<sup>5</sup> no order for the execution of the same decree shall be made upon

Execution barred in certain cases.

any fresh application presented after the expiration of twelve years<sup>6</sup> from —

(a) the date of the decree sought to be executed,<sup>10</sup> or,

(b) where the decree or any subsequent order<sup>11</sup> directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods,<sup>12</sup> the date of the default in making the payment or delivery in respect of which the applicant seeks to execute the decree.

(2) Nothing in this section shall be deemed —

(a) to preclude the Court from ordering the execution of a decree upon an application presented after the expiration of the said term of twelve years, where the judgment-debtor has, by fraud or force,<sup>15</sup> prevented the execution of the decree at some time within twelve years immediately before the date of the application : or

(b) to limit or otherwise affect the operation of article 180 of the second Schedule to the Indian Limitation Act, 1877.<sup>2</sup>

[1877, S. 230 paras. 3 and 4 and S. 231; 1859, S. 207.]

*Synopsis*

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Other Topics

Combined mortgage decree—See Note 10 Pts. (5) and (6).  
Continuation of application—Step-in-aid of execution. See Notes 7 and 8.  
Decree directing mesne profits to be ascertained in execution. See Note 10 F. N. 3.  
Decree not being a decree for injunction. See Note 1 Pt. (6).  
Dekkhan Agriculturists' Relief Act, 17 of 1879. See Note 14.  
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Execution. See Note 10 F. N. 3.  
Execution by Collector. See Note 14.  
Limitation Act, Sections 4 and 15. See Note 14 Pts. (1) and (2).  
Maintenance decree. See Note 12 Pt. (4).  
Terminus a quo for limitation. See Note 10.  
To limit or otherwise affect Art. 180 of Limitation Act. See Note 2.  
Where decree is transferred for execution. See Section 39.

**1. Legislative changes.** — This Section corresponds to paragraphs 3 and 4 of Section 230 of the Code of 1882 with the following alterations:—

- (i) The old Section applied only to decrees for payment of money or delivery of other property. The present Section is made applicable to all decrees of any kind whatsoever, except decrees granting injunction. See Note 2 below.
- (ii) The words "under the Section and granted" occurring after the word "made" in the old Section have been omitted, with the result that the present Section applies under whatever Code the previous application may have been made and whether such application was granted or not. See Note 2 below.
- (iii) For the words "no subsequent application to execute the same decree shall be granted after" have been substituted the words "no order for execution of the same decree shall be made upon any fresh application presented after." See Notes 6 and 7 below.
- (iv) The words "or of the decree in appeal (if any) affirming the same" have been omitted as superfluous and tending to confusion. See Note 10 below.
- (v) The words "or at recurring periods" have been newly added in sub-section (1) clause (b). See Note 12 below.
- (vi) Sub-section (2) clause (b) was newly added. See Note 9 below.

Article 180 of the second Schedule of the Indian Limitation Act, 1877, corresponds to Article 183 of the Indian Limitation Act, IX of 1908, Schedule I.

**2. Object, applicability and scope of the Section.** — A decree-holder is entitled, as of right, to execute his decree and for that purpose may make any number of applications in succession.<sup>1</sup> He cannot be refused execution unless his application is barred by the principles of *res judicata* or by Article 182 of the Limitation Act, 1908. This Section imposes a further restriction on the rights of the decree-holder by fixing a *maximum limit of time* for execution and by enacting that no order for execution shall be made upon an application presented after the expiry of twelve years from certain specified dates.<sup>2</sup> The effect of the Section is not to supersede the law of

Section 48 — Note 2

1. ('95) 17 All 106 (111, 112); 22 Ind App 44 (PC).
2. ('24) AIR 1924 All 263 (265) : 46 All 73.
- ('22) AIR 1922 Mad 268 (268) : 45 Mad 785.
- ('26) AIR 1926 All 93 (94) : 48 All 121.
- ('24) AIR 1924 Mad 163 (167) : 47 Mad 120.

Under the Code of 1877, S. 230, there was a provision for an application to be made after the 12 years, if the same was made within 3 years

of the passing of that Code. But only one such application could be made within those three years :

- ('81) 1881 All W N 58 (58). (Meaning of "after the passing of the Code" in S. 230 of 1877 Code.)
- ('82) 1882 All W N 2 (2). (Do.)
- ('83) 7 Bom 214 (216). (Do.)
- ('85) 1885 All W N 193 (193).
- ('80) 5 Bom 245 (246).

limitation but only to fix the *outside period* after which, *execution* of a decree, though not barred by the Limitation Act, may not be granted.<sup>3</sup> The object of this Section is to prevent execution proceedings being kept pending indefinitely to the harassment of judgment-debtors and to require sufficient diligence on the part of the decree-holders.<sup>3a</sup>

Section 230 of the old Code referred only to decree for the *payment of money or delivery of other property*, and it was consequently held that it did not apply to *mortgage* decrees.<sup>4</sup> There was also a conflict of opinion as to the application of the Section to cases where a decree was passed personally against *A* for payment of money, and in default, for sale of *B*'s (surety's) property.<sup>5</sup> The omission of the words, "for the payment of money or delivery of other property" in the present Section makes it clear that it applies to *all* decrees of any kind except a decree granting injunction.<sup>6</sup>

Before the execution of a decree can be held to be barred under the Section, it must be shown that the decree was, in all parts, ripe for execution on the date from which the twelve years' period is to be computed.<sup>6a</sup> Where a decree-holder applies for execution and a fresh application therefor in the future is likely to be barred under the provisions of this Section, the Court should allow the decree-holder to exhaust all lawful means of realising his decree in the pending application, before finally dismissing it.<sup>7</sup> But the salutary rule enacted in this Section should not be permitted to be evaded as, for example, by striking off an execution petition and continuing the attachment so as to enable the decree-holder to apply for execution after the twelve years' period under the pretext of continuing a pending application.<sup>8</sup>

The Section only requires that the *application* should be presented within twelve years. The *order* on such application may be made even after the expiry of the specified period.<sup>9</sup>

('87) 11 Bom 524 (526).

('86) 12 Cal 559 (561).

('77) 2 Mad 218 (218).

('81) 7 Cal 556 (559).

[See ('84) 6 All 189 (192).]

[See also ('82) 1882 All W N 111 (111).]

3. ('32) AIR 1932 Oudh 220 (221).

('89) 1889 Pun Re No. 109, page 380.

('93) 1893 All W N 124 (125).

('88) 1888 Pun Re No. 27, page 73.

('32) AIR 1932 Oudh 69 (71) : 8 Oudh W N 1186 (1191). (Section in effect lays down limitation for execution of decree under S. 78 (2), Provincial Insolvency Act.)

('91) 1891 Pun Re No. 9, page 81.

('15) AIR 1915 Bom 40 (41) : 39 Bom 256. (Execution may be barred under this Section, though the application may not be barred by *res judicata* or Art. 182, Limitation Act.)

[See ('05) 1905 Upp Bur Rul C P C 26.

3a. ('28) AIR 1928 Mad 1154 (1156).

4. (13) 18 Ind Cas 455 (457) (Cal).

('98) 25 Cal 580 (583, 584).

('05) 28 Mad 224 (226).

(1900) 22 All 401 (403). (Even though the judgment-debtor was personally liable for the deficiency.)

('05) 28 Mad 473 (478). (FB). (Do.)

('03) 25 All 541 (543, 544).

('94) 16 All 418 (419, 420).

('93) 1893 All W N 184 (184).

('98) 1898 All W N 114 (115). (Decree against legal

representative out of assets—Decree for money.)

('08) 1908 Pun L R No. 121, page 369 (369).

(Decree for money by sale of specific property — Decree for money under this Section.)

[But see ('04) 31 Cal 792 (796). (Where a combined decree (mortgage as well as a personal decree for balance) under Ss. 88 and 90, Act IV of 1882, is passed though wrongly and the decree-holder proceeds to execute it for the balance after the property has been sold, this Section will apply—25 All 541 Dissented from.)]

5. ('12) 16 Ind Cas 190 (191) : 34 All 636. (Applies.)

('12) 13 Ind Cas 187 (187, 188) (All). (No.)

6. ('15) AIR 1915 Mad 407 (410). (Decree directing execution of conveyance.)

('15) AIR 1915 Bom 40 (41) : 39 Bom 256. (Compromise decree.)

6a. ('20) AIR 1920 Nag 40 (41).

[See also ('08) 5 All L Jour 403 (404). (Such as decree ordering sale of share in a non-existing village.)]

7. ('26) AIR 1926 Lah 544 (544).

8. ('10) 8 Ind Cas 727 (728) (Oudh).

[See also ('28) AIR 1928 Mad 1154 (1155).

9. ('37) AIR 1937 Mad 113 (113).

('83) 6 Mad 359 (361).

('34) AIR 1934 Lah 610 (611, 612).

('10) 5 Ind Cas 474 (475) (Mad). (Also an application presented in time but corrected at the Court's direction and re-presented after time is not defective in any way and is not barred.)

This Section does not apply to decrees of Presidency Small Cause Courts and such decrees, though transferred for execution to the City Civil Court, are nonetheless not governed by the Section.<sup>10</sup>

The Section bars only the *execution of the decree* after the specified period. The rights of the decree-holder in other respects are not in any way affected by its provisions.<sup>11</sup>

**3. Retrospective operation of the Section.** — It has already been observed in Note 3 to the Preamble that no one has a vested right in *procedure*. The right to execute a decree is only a right of *procedure* and not a *vested* right<sup>1</sup> and the law governing an application to execute a decree will be the law of procedure in force at the time of the *application* and not the law in force when the decree was passed.<sup>2</sup> Thus, where a mortgage decree is passed under the old Code but an application is presented for execution of that decree more than twelve years after the date of the decree and after the present Code came into force, the application will be barred though Section 230 of the old Code did not apply to mortgage decrees.<sup>3</sup>

**4. "Application to execute a decree."** — An application to execute a decree means an application under O. 21 R. 11 or otherwise by "which proceedings in execution are *commenced* and not merely an *incidental* application."<sup>1</sup> It should be an application in accordance with law, asking for a relief granted by the decree and for obtaining it in the mode admitted by law.<sup>2</sup> An application to the Court passing a decree to *transfer* it for execution to another Court is not such an application.<sup>3</sup> But where a decree gives reliefs of different characters, there is nothing in the Code preventing separate and successive applications for execution as regards each of such reliefs.<sup>4</sup>

**5. "Has been made."** — As to the distinction between the present Section and old Section 230 in this respect, see Note 2 above. The words "under this Section and granted" which occurred after the word "made" in the old Section gave rise to

('26) AIR 1926 All 331 (331, 332):

[See ('30) AIR 1930 Mad 995 (998): 54 Mad 306.]

10. ('11) 11 Ind Cas 635 (637) : 36 Mad 108.

11. ('10) 5 Ind Cas 92 (93): 33 Mad 429. (Mortgage of a mortgage decree after 12 years — Mortgagee can sue decree-holder for recovery of moneys realised by him.)

('24) AIR 1924 Mad 163 (165, 167) : 47 Mad 120. (It does not mean that a decree more than 12 years old is not provable in insolvency proceedings.)

### Note 3

1. ('13) 21 Ind Cas 113 (114, 115) (Cal). (The right to execute a decree is not a substantive right.)

('17) AIR 1917 Pat 485 (486). (No vested right in the procedure prescribed in that Code was acquired by the decree-holder.)

[But see ('10) 32 All 499 (502). (The right to enforce execution of decree is a substantive right.)]

2. ('26) AIR 1926 All 93 (94) : 48 All 121.

('81) 3 Mad 98 (101).

Section 230 of the Code of 1882 was held in the following cases not to revive decrees dead under the Code of 1877 :

('84) 6 All 388 (390).

('86) 8 All 419 (427).

3. ('21) AIR 1921 Bom 40 (43) : 45 Bom 365.

('13) 21 Ind Cas 923 (924) (Cal).

('17) AIR 1917 Pat 493 (494).

('13) 19 Ind Cas 391 (392) : 40 Cal 704.

('15) AIR 1915 Nag 103 (106) : 11 Nag L R 25.

('17) AIR 1917 Mad 315 (316).

('24) AIR 1924 All 696 (696).

('25) AIR 1925 Bom 326 (326).

('13) 19 Ind Cas 899 (900) (Cal).

[See however ('19) AIR 1919 Cal 1003 (1004). (The mere fact of coming into force of the new Code pending a suit on a mortgage under the Transfer of Property Act does not make the new S. 48 applicable to proceedings in execution of the decree in that suit.)]

### Note 4

1. ('77) 3 Cal 235 (242) (FB).

('78) 2 Mad 1 (4).

('98) 1898 Pun Re No. 40, page 138.

2. ('89) 13 Bom 237 (239).

3. ('29) AIR 1929 Mad 745 (745).

('12) 14 Ind Cas 277 (277) (All).

('26) AIR 1926 All 660 (660).

('86) 1886 All W N 137 (137).

('98) 20 All 78 (79).

('10) 8 Ind Cas 168 (171) : 35 Bom 103.

('12) 14 Ind Cas 172 (173) : 34 All 396.

('89) 16 Cal 744 (746).

4. ('91) 18 Cal 515 (518).

As a general rule where the previous application has been suspended or stayed or dismissed for no fault of the decree-holder and the second application is similar in scope and character to the previous one, the second application will be deemed to be an *ancillary one in continuation* of the previous one.<sup>5</sup> Where the *character* of the second application is different from that of the former, as for instance, where the relief claimed in the second application is against properties or persons different from those in the previous application, the second application will be deemed to be a "fresh application"

5. ('37) AIR 1937 Nag 92 (93) : I L R (1937) Nag 522.
- ('37) AIR 1937 Pat 43 (44). (Execution sale set aside—Next application for sale.)
- ('36) AIR 1936 Lah 843 (844). (Temporary release of attached property in pursuance of judgment-debtor's objections—Objections overruled in appeal—Re-attachment of the same property—Continuation of previous proceedings.)
- ('35) AIR 1935 Lah 911 (912). (Proceedings interrupted by claim suit.)
- ('24) AIR 1924 Pat 367 (369, 370).
- ('34) AIR 1934 Pat 532 (533). (Previous application for execution not proceeded with because of claim made and allowed—Subsequent application after the removal of the bar is one in continuation of the first.)
- ('34) AIR 1934 All 481 (487, 489, 493) : 56 All 791 (F B). (Execution petition for the sale of some of the mortgaged properties by transfer to Collector with a statement that in case of deficiency the other mortgaged properties may be sold—First prayer granted but no orders on second—Subsequent application for second relief is only a continuation of the first application.)
- ('31) AIR 1931 Bom 492 (494).
- ('22) AIR 1922 Mad 3 (5). (The theory of continuation applies only where the previous application has been interrupted by reason of circumstances over which the decree-holder has no control.)
- ('12) 14 Ind Cas 172 (173) : 34 All 396. (To render an application one in continuation of another application, it is necessary that the two applications should be of the same nature.)
- ('14) AIR 1914 Oudh 430 (432) : 17 Oudh Cas 169.
- ('18) AIR 1918 Pat 296 (297) : 3 Pat L Jour 103.
- ('11) 11 Ind Cas 48 (49) (Cal).
- ('13) 18 Ind Cas 841 (843) (Cal).
- ('09) 3 Ind Cas 940 (940) (Mad). (That the order "proceedings closed" did not amount to dismissal.)
- ('30) AIR 1930 Lah 647 (651). (On an application records consigned to the record room pending appeal—Nature of order is a question of intention.)
- ('84) 10 Cal 416 (423). (Striking off.)
- ('92) 16 Bom 294 (302, 303). (Application struck off not necessarily cancelled.)
- ('16) AIR 1916 All 24 (24). (Injunction.)
- ('26) AIR 1926 All 331 (332). (Applications by decree-holder to the Court executing the decree to go on from where the previous proceedings have been arrested and to complete the execution are to be considered as merely ancillary and therefore not barred by the Section.)
- ('98) 1898 All W N 137 (138) (Do.)
- ('12) 16 Ind Cas 541 (542) (Cal). (Judgment-debtor declared insolvent.)
- ('13) 20 Ind Cas 244 (245) (Cal). (Injunction.)
- ('09) 1 Ind Cas 341 (343) (Cal). (Execution saleset aside—Further application for execution is in continuation of previous one.)
- ('85) 1885 All W N 269 (269). (Postponement of execution to enable debtor to raise money—Subsequent application for execution held to be linked to the prior one.)
- ('88) 1888 All W N 295 (296). (First application made in May, 1883, struck off without either granting or refusing it.)
- ('05) 2 All L Jour 276 (277). (Former application never finally disposed of.)
- ('13) 21 Ind Cas 923 (924) (Cal).
- ('15) AIR 1915 Mad 407 (411). (Disposal of previous application not known.)
- ('08) 31 Mad 71 (74). (Conditions under which prior execution petition will be treated as pending.)
- ('10) 7 Ind Cas 707 (708) (All). (Obstruction by judgment-debtor—Application after removal of obstruction.)
- ('11) 10 Ind Cas 359 (360) (Cal).
- ('10) 6 Ind Cas 490 (490) (Lah). (First application struck off on judgment-debtor not being found—Second application for arrest held to be a continuation of the prior one.)
- ('99) 21 All 155 (158). (Do.)
- ('31) AIR 1931 Lah 125 (126). (Dismissal for decree-holder's default—Not a continuation.)
- See also the following cases to a similar effect under the old Code :*
- ('08) 30 All 499 (503, 504).
- ('09) 1909 Pun Re No. 45, page 148.
- ('83) 5 All 459 (461).
- ('98) 21 Mad 261 (263).
- ('83) 5 All 243 (244, 245).
- ('81) 5 Bom 29 (35).
- ('86) 8 All 545 (548).
- ('01) 23 All 13 (20).
- ('87) 14 Cal 385 (387).
- ('79) 4 Cal 415 (416, 417).
- ('06) 28 All 651 (654).
- ('86) 12 Cal 161 (164, 165).
- ('77) 1 All 355 (360) (F B).
- ('82) 9 Cal L Rep 297 (300).
- ('84) 6 All 23 (24).
- ('94) 21 Cal 387 (391).
- ('95) 17 All 425 (427).
- ('95) 17 All 243 (244).
- ('05) 27 All 334 (338) : 32 Ind App 102 (P O).
- ('01) 1901 All W N 117 (117).

within the meaning of this Section.<sup>6</sup> Similarly, where the proceedings under the prior application have *come to an end*, the second application cannot be taken to be one in continuation of the prior application.<sup>6a</sup>

Where an application made within twelve years of the specified date is found to be defective, an amendment thereof after twelve years is not necessarily *ultra vires* of the powers of the Court. But a decree-holder who is not diligent should not in the absence of special and sufficient grounds be allowed to circumvent the provisions of this Section by way of amendment. Where the decree-holder applied on the last day of limitation for the arrest and attachment of *moveable* property of the judgment-debtor and thereafter sought to amend it by adding a prayer for the attachment of *immovable* property, it was held that the result of allowing the amendment would be to circumvent the provisions of this Section and that it should not therefore be allowed.<sup>6b</sup> Where an amendment is allowed, the question whether it will operate so as to make the application a proper one for the purposes of the Section on the date on which it was made, depends upon the circumstances of each case.<sup>7</sup> If the defect is not a fundamental one, it will have such operation.<sup>8</sup> If it is a fundamental one, the amendment will not operate to save limitation under this Section.<sup>9</sup>

A Court executing a decree, while rejecting an application for execution, is not competent to order that a fresh application may be filed within a certain time when such an application would be barred by the Section.<sup>10</sup>

**8. Successive applications for execution of decrees of Courts other than Chartered High Courts.** — See Note 2 above. As has been observed in that Note, this Section only fixes the *maximum* limit of time for execution of a decree and subject to such outside limit, a final order on a previous execution application or an application to take some step-in-aid of execution will afford a fresh starting point of limitation.<sup>1</sup>

6. ('36) AIR 1936 Pesh 209 (210).
- ('29) AIR 1929 P C 209 (212) (P C).
- ('96) 18 All 9 (11). (First application for attachment—Second for arrest.)
- ('12) 13 Ind Cas 929 (929) (All). (First application for arrest—Second for attachment.)
- ('31) AIR 1931 All 31 (32). (Do.)
- ('02) 1902 Pun L R No. 112.
- ('10) 5 Ind Cas 815 (816) : 1910 Pun Re No. 17. (First application against moveables — Second against immovables.)
- ('28) AIR 1928 Cal 241 (243). (First application for rateable distribution—Second application for attachment and sale.)
- ('81) 7 Cal 556 (558, 559). (Substitution of new properties.)
- ('31) AIR 1931 All 134 (134) : 53 All 419. (Do.)
- ('24) AIR 1924 Cal 131 (132) : 50 Cal 743. (Adding of new properties.)
- ('26) AIR 1926 All 93 (95) : 48 All 121.
- ('18) AIR 1918 Mad 449 (449). (Prior application for sale of hypothecated property—Second application for sale of other properties.)
- 6a. ('12) 13 Ind Cas 160 (160) (Mad).  
[See also ('93) 1893 All W N 124 (125).  
(13) 20 Ind Cas 563 (564) (Lah).]
- 6b. ('36) AIR 1936 Mad 623 (624).
7. ('28) AIR 1928 Mad 1154 (1155, 1156).
8. ('35) AIR 1935 Mad 161 (163). (Execution application filed bona fide against wrong legal

representative within time—Amendment allowed but after 12 years' time—Amendment takes effect from date of original representation.)

- ('15) AIR 1915 Mad 1042 (1043).
- ('05) 1905 Pun Re No. 27. (Amendment as to particulars.)  
[See also ('30) AIR 1930 Oudh 65 (66) : 5 Luck 458. (Application returned for not filing process fee with the application—Amendment is retrospective.)]
9. ('15) AIR 1915 Mad 1042 (1043).
- ('90) 17 Cal 631 (636, 637, 638 and 641) (FB).
- ('28) AIR 1928 Lah 808 (811). (Application to file a supplementary list of properties.)
- ('27) AIR 1927 Mad 347 (347). (Amendment by adding other items of property.)
- ('05) 15 Mad L Jour 243 (244). (An application for arrest of judgment-debtor if subsequently amended by a prayer for execution against his properties is a fresh application.)
- ('02) 1902 Pun L R No. 112. (Do.)
- ('03) 26 Mad 101 (103). (Petition when filed unverified.)
- ('29) AIR 1929 Pat 407 (409) : 8 Pat 462. (Amendment by substituting immovables properties in place of moveables cannot be made.)
10. ('09) 4 Ind Cas 958 (959) (Lah).

#### Note 8

1. See Article 182 (5) of the Limitation Act, as amended by Act IX of 1927.

As to what are "steps-in-aid of execution," see the Limitation Act, Article 182 and also the undermentioned cases.<sup>2</sup>

**9. Applicability of the Section to Chartered High Courts—Sub-section 2 (b)** — Sub-section 2 (b) is new. It was held under the old Code that, in view of the provision in Article 180 of the Limitation Act, 1877, for a revivor of the decrees of Chartered High Courts in the exercise of *ordinary original civil jurisdiction* and of orders of His Majesty in Council, Section 230 did not apply to Chartered High Courts in the exercise of *ordinary original civil jurisdiction*.<sup>1</sup> Sub-section 2 (b) has been added to give legislative recognition to that view. In the case of such decrees and orders, therefore, any number of applications for execution can be made and cannot be refused<sup>2</sup> unless they are barred on the principle of *res judicata*<sup>3</sup> or under Article 183 of the Limitation Act, 1908. Article 183 of the Limitation Act, 1908, does not however apply to decrees of Chartered High Courts in the exercise of *appellate jurisdiction*.<sup>4</sup>

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|--|---|
| 2. ('84) 7 Mad 306 (307).                        | ('10) 5 Ind Cas 758 (758) (Mad).        |
| ('91) 15 Bom 405 (407).                          | ('29) AIR 1929 Bom 279 (283).           |
| ('98) 22 Bom 722 (726).                          | ('10) 8 Ind Cas 833 (834) (Cal).        |
| ('95) 22 Cal 375 (377).                          | ('12) 17 Ind Cas 30 (30) : 36 Bom 638.  |
| ('98) 2 Cal W N cclxxi (Note).                   | ('10) 5 Ind Cas 147 (148) (Cal).        |
| ('13) 18 Ind Cas 97 (98) : 16 Oudh Cas 70.       | ('83) 5 All 344 (345).                  |
| ('13) 19 Ind Cas 664 (665) : 35 All 389.         | ('98) 25 Cal 594 (601) (FB).            |
| ('98) 20 Cal 755 (757).                          | ('94) 21 Cal 23 (26).                   |
| ('94) 1894 Pun Re No. 27.                        | ('94) 16 All 75 (77).                   |
| ('97) 24 Cal 778 (780, 784).                     | ('96) 23 Cal 817 (821).                 |
| ('11) 9 Ind Cas 800 (801) (All).                 | (1900) 27 Cal 285 (288).                |
| ('13) 21 Ind Cas 782 (783) (Mad).                | ('82) 5 Mad 141 (142).                  |
| ('91) 15 Bom 242 (244).                          | ('96) 19 Mad 67 (70).                   |
| ('91) 15 Bom 245 (247).                          | ('97) 19 All 71 (72).                   |
| ('99) 26 Cal 888 (890).                          | (1900) 27 Cal 210 (212, 215).           |
| ('83) 6 Mad 250 (251).                           | ('09) 2 Ind Cas 88 (88) (All).          |
| ('94) 17 Mad 76 (77).                            | ('09) 31 All 309 (312).                 |
| ('15) AIR 1915 Mad 1042 (1043).                  | ('99) 23 Bom 478 (483).                 |
| ('08) 31 Mad 234 (235).                          | ('85) 7 All 898 (899).                  |
| ('08) 31 Mad 68 (69).                            | ('89) 16 Cal 747 (748).                 |
| ('93) 16 Mad 452 (453).                          | ('91) 13 All 124 (126).                 |
| ('99) 23 Bom 644 (651).                          | ('04) 31 Cal 1011 (1013).               |
| ('91) 13 All 89 (92).                            | ('88) 11 Mad 336 (339).                 |
| ('88) 15 Cal 363 (365).                          | ('95) 22 Cal 827 (829).                 |
| ('96) 23 Cal 690 (692).                          | ('99) 23 Bom 311 (312).                 |
| ('91) 13 All 211 (213).                          | ('85) 11 Cal 227 (229).                 |
| ('12) 14 Ind Cas 468 (469) : 1912 Pun Re No. 60. | ('98) 21 Mad 400 (401).                 |
| ('15) AIR 1915 Mad 314 (315).                    | ('83) 9 Cal 730 (731).                  |
| ('94) 21 Cal 23 (26).                            | (1900) 22 All 358 (359).                |
| ('97) 19 All 477 (479).                          | ('03) 30 All 179 (180).                 |
| (1900) 27 Cal 709 (713).                         | ('97) 19 All 337 (339).                 |
| ('01) 24 Mad 185 (188).                          | ('99) 22 Mad 448 (452).                 |
| ('09) 1 Ind Cas 430 (431) (Cal).                 | ('98) 20 All 304 (306, 307).            |
| ('82) 8 Cal 89 (91).                             | ('04) 26 All 608 (610).                 |
| ('84) 10 Cal 549 (550, 551).                     | ('96) 22 Bom 83 (85).                   |
| ('94) 17 Mad 165 (166).                          | ('10) 6 Ind Cas 490 (490) (Lah).        |
| ('96) 23 Cal 196 (199).                          | ('88) 1888 Pun Re No. 27, p. 73.        |
| ('98) 22 Bom 340 (343).                          | ('08) 1908 Pun Re No. 103, p. 480 (FB). |
| ('12) 14 Ind Cas 335 (339) (Lah).                |   |
| ('01) 24 Mad 188 (194).                          |   |
| ('80) 3 All 320 (321).                           |   |
| ('82) 4 All 60 (62).                             |   |
| ('86) 12 Cal 603 (609).                          |   |
| ('87) 9 All 9 (10).                              |   |
| ('90) 12 All 399 (403, 404).                     |   |
| ('93) 20 Cal 696 (698).                          |   |
| ('14) AIR 1914 Bom 288 (289) : 38 Bom 47.        |   |

#### Note 9

1. ('09) 1 Ind Cas 168 (174) : 36 Cal 543.
2. See Art. 183 of the Limitation Act, 1908.
3. See S. 11, Note 23.
4. ('72) 14 Moo Ind App 465 (484) (PC). (Case under Act XIV of 1859.)



**10. "Date of the decree sought to be executed."** — In the absence of the circumstances specified in sub-section 1 (b) and in the absence of anything postponing the period of execution, the period of twelve years is to be computed from the date of the decree.<sup>1</sup> The date of the decree is the date which it ought to bear under O. 20 R. 7 and not the date when it is actually *prepared* and signed by the Judge.<sup>2</sup>

Where there is a preliminary and a final decree in a suit, the two must, for the purposes of this Section, be taken to be a single and indivisible decree and the date from which the time is computed is the date of the *final* decree.<sup>3</sup> Where a decree is amended, the date of the amendment will not give a fresh starting point of limitation under this Section.<sup>4</sup> In the case of a combined mortgage decree which provides that if the nett proceeds of the sale are not sufficient to satisfy the mortgagee's claim the balance be realised from the person and other properties of the mortgagor, the period will run from the date of the decree in respect of *both* remedies.<sup>5</sup> If, however, after the sale of the mortgaged properties a personal decree for the balance is passed under O. 34 R. 6, time will run in respect of the personal decree from the date thereof.<sup>6</sup> Where a redemption decree does not mention any date for the payment of the mortgage debt, it must be taken as payable on the date of the decree itself.<sup>7</sup>

The words "or of the decree in appeal confirming the same" have been omitted in this Section as being a mere surplusage. Where there has been an appeal from the original decree, the period under the Section is to be computed from the date of the appellate decree even though the appeal was only from a *portion* of the original decree<sup>8</sup>

('81) 6 Cal 201 (202).

#### Note 10

1. (1900) 2 Bom L R 199 (200).
- ('08) 11 Oudh Cas 57 (58, 59).
2. ('97) 1 Cal W N 93 (94).
- ('18) AIR 1918 Bom 217 (218) : 42 Bom 309.
3. ('16) AIR 1916 Cal 482 (483).
- ('24) AIR 1924 Cal 131 (132) : 50 Cal 743.
- ('07) 6 Cal L Jour 462 (465). (Final decree awarding mesne profits.)
- ('18) AIR 1918 All 254 (255) : 40 All 211. (Direction for enquiry into mesne profits—Assumed to operate as a final decree.)
- ('97) 19 All 520 (521). (Order absolute under S. 89 of the Transfer of Property Act now equivalent to a final decree.)
- [But see ('27) AIR 1927 Mad 342 (344). (Decree directing ascertainment of mesne profits in execution—Time runs from date of decree and not from date of ascertainment.)
- ('16) AIR 1916 Mad 288 (290) : 39 Mad 544. (Decree-holder will have 12 years from date of order absolute under S. 89 of the Transfer of Property Act—The decree under S. 88 itself could have been executed within 12 years from the date thereof.)
- Note:—In both the above cases, the decrees were passed under the old Code. The points are not likely to arise under this Code which provides for a preliminary and a final decree in such cases.
- ('22) AIR 1922 Bom 95 (95) : 46 Bom 761. (Mortgage decree under Dekkhan Agriculturists' Relief Act — No necessity for decree absolute — Time runs from date of decree.)]
4. ('35) AIR 1935 Lah 292 (294).

('34) AIR 1934 Oudh 465 (469). (AIR 1932 All 351 Followed.)

('18) AIR 1918 Bom 217 (221) : 42 Bom 309.

('32) AIR 1932 All 351 (352) : 54 All 622. (60 Ind Cas 318 dissented.)

[But see ('21) 60 Ind Cas 318 (319) (Pat).

('26) 99 Ind Cas 204 (205) (Oudh).]

5. ('17) AIR 1917 P C 85 (85) (PC).

('15) AIR 1915 Cal 8 (8).

('16) AIR 1916 Mad 972 (974).

('21) AIR 1921 Cal 456 (456, 457).

('25) AIR 1925 Mad 331 (331).

('28) AIR 1928 Cal 668 (668, 669).

('26) AIR 1926 Mad 954 (955) : 50 Mad 5.

*In view of the Privy Council ruling in AIR 1917 P C 85, the following decisions are no longer law:*

('18) AIR 1918 Mad 1187 (1194) : 40 Mad 989 (FB).

('12) 15 Ind Cas 822 (824) : 36 Bom 368.

[See also ('26) AIR 1926 Mad 20 (28) : 48 Mad 846. (AIR 1918 Mad 1187 (FB) and AIR 1918 Mad 607 were held to be overruled by AIR 1917 P C 85 (PC).)]

6. ('26) AIR 1926 Mad 954 (955) : 50 Mad 5.

('20) AIR 1920 Cal 378 (379).

7. ('89) 13 Bom 567 (570).

('92) 16 Bom 480 (485, 486).

('99) 23 Bom 592 (594).

8. ('03) 26 Mad 91 (93, 95, 96) (F B).

('11) 12 Ind Cas 75 (75) (Mad).

('77) 1 All 508 (509).

('81) 6 Cal 194 (196).

('82) 4 All 274 (276). (It is not necessary that the appeal should be from the original decree in the suit—The appeal may be from decree passed on review.)

and even if the original decree is confirmed in appeal<sup>9</sup> or is dismissed as not pressed.<sup>9a</sup> The same principle applies to cases of appeals to the Privy Council.<sup>10</sup> Where, however, an appeal is preferred where no appeal lies,<sup>11</sup> or where an appeal is withdrawn<sup>12</sup> or is dismissed for default,<sup>13</sup> or is rejected for insufficiency of stamp,<sup>14</sup> time will run only from the *original* decree. Where a decree is passed *severally* against two or more defendants and one of the defendants appeals, the period of twelve years as against the other defendants runs from the date of the original decree.<sup>15</sup> In the light of the decision in A.I.R. 1932 Privy Council 165, the above view might require reconsideration.

Where an application to set aside an *ex parte* decree has been rejected, the period for the execution of the *ex parte* decree runs from the date of the decree notwithstanding the pendency of the application.<sup>16</sup>

It has been held in the undermentioned case<sup>17</sup> that this Section obviously refers to a decree which is *capable of execution* and that in the case of a decree which is not capable of execution except on the happening of a particular contingency, time will not begin to run until that contingency occurs.

**11. Subsequent order, meaning of.** — Where a subsequent order directs payment of money or delivery of property at a future date, the period of twelve years will run from such date.<sup>1</sup> Thus, an order under O. 20 R. 11 (2) will be a subsequent order within the meaning of this Section.<sup>2</sup> According to the High Courts of Allahabad<sup>3</sup>

('83) 9 Cal 100 (102).

('84) 6 All 14 (16).

('86) 8 All 573 (575).

('89) 16 Cal 598 (602, 603).

('92) 19 Cal 750 (755).

('95) 17 All 103 (105).

('95) 22 Cal 467 (472).

('96) 23 Cal 876 (883).

('98) 22 Bom 500 (505, 508).

('98) 25 Cal 594 (601, 602). (FB).

('99) 23 Mad 60 (67, 69).

('07) 1907 Pun Re No. 32, p. 124.

('12) 16 Ind Cas 370 (372) (Cal).

('05) 27 All 501 (504, 505, 508, 509). (FB).

[See however ('78) 2 Cal L Rep 471 (473). (Appeal by one of the defendants with respect to his share not imperilling the whole decree — Time runs against the non-appealing defendants from the original decree.)]

9. ('11) 12 Ind Cas 75 (75) (Mad).

('94) 18 Bom 203 (205).

('10) 5 Ind Cas 473 (474): 32 All 136. (Dismissing appeal on the ground that it had abated, dissenting from 20 All 124 which was a case under the Limitation Act.)

('95) 19 Bom 258 (260).

('09) 2 Ind Cas 364 (364): 31 All 379. (Though appellate decree is the one to be executed, it does not by implication extend the time fixed by original decree for performance of any condition precedent.)

('08) 31 Mad 28 (31, 32). (Such extension must follow impliedly or expressly from the appellate decree.)

('87) 11 Bom 172 (173). (Such extension is a question of intention of the appellate decree.)

9a. ('38) AIR 1938 Pat 401 (402).

('08) 30 All 385 (386, 387).

10. ('80) 2 All 763 (764, 765).

('81) 7 Cal 620 (622, 627).

11. ('26) AIR 1926 All 440 (442, 443): 48 All 377.

[But see ('21) AIR 1921 All 134 (134): 43 All 405.]

12. ('08) 1908 Pun Re No. 54, p. 266.

13. ('18) AIR 1918 Oudh 446 (449).

14. ('84) 6 All 438 (439).

15. ('26) AIR 1926 Cal 664 (664).

('91) 13 All 1 (15, 16) (F B).

('04) 1 All L Jour 409 (411).

('23) AIR 1923 Bom 400 (400). (Decree against A but not against B — Plaintiff appealing for decree against B also — Appeal dismissed — Time against A runs from original decree.)

16. ('92) 16 Bom 123 (125).

17. ('39) AIR 1939 Bom 75 (78): ILR (1939) Bom 87.

#### Note 11

1. ('09) 1 Ind Cas 48 (49) (Lah).

2. ('21) AIR 1921 Pat 340 (340).

('17) AIR 1917 Mad 188 (188). (But the application under O. 21 R. 11 must have been made within limitation period of Article 175 — Otherwise order of the Court is without jurisdiction and will not save time — However, see AIR 1923 Lah 381 where it was held that as the parties agreed to such an application which was made beyond limitation, the application was good.)

[See ('24) AIR 1924 Lah 342 (344).]

[See also ('25) 21 Mad L W (Jour S R C) 29 (29) (Per Wallace, J.)]

[But see ('08) 18 Mad L Jour 548 (549). (Order under Sec. 257-A of the old Code (now deleted) held not to be a subsequent order.)]

3. ('18) AIR 1918 All 216 (218): 40 All 198.

('32) AIR 1932 All 273 (279, 282, 285): 54 All 573 (F B).

('83) 1883 All W N 147 (147). (Arrangements for paying off decree in instalments not carried out by order of Court.)

[See also ('91) 1891 All W N 12 (13). (Order made without jurisdiction will not save time.)]

and Patna<sup>4</sup> and the Chief Court of Oudh,<sup>4a</sup> a subsequent order must be one passed by the Court which passed a decree *as such* Court and not an order of an *executing* Court. The Bombay High Court<sup>5</sup> has, on the other hand, held that the order may be of *any competent Court* including a Court of execution. The Calcutta<sup>6</sup> and Lahore<sup>7</sup> High Courts and the Courts of the Judicial Commissioner of Nagpur<sup>8-9</sup> and Sind<sup>9a</sup> are also inclined to this latter view.

**12. "At a certain date or at recurring periods."** — Where a decree does not fix a *definite* date the question whether a sum is payable by a certain date should be ascertained by construction of the decree and if so ascertainable, time runs from that date.<sup>1</sup> An order merely directing a compromise petition for payment by instalments to be filed, is not an order directing payments to be made at a *particular date*.<sup>2</sup>

Decrees for payment in instalments, annual or monthly,<sup>3</sup> and decrees for future maintenance,<sup>4</sup> are decrees for payment "at recurring periods." Time in the case of such decrees and of decrees for the payment of money at a particular date, runs from the date of default or the expiry of the period as the case may be.<sup>5</sup> Where an instalment decree provides for the payment of the whole sum in default of any one instalment and either no option is given to the decree-holder or an option is given and exercised by him, time for the execution of the whole decree runs from the date of the *first default*.<sup>6</sup>

In the undermentioned case,<sup>6a</sup> an instalment decree provided that in default of payment of any instalment, the decree-holder was entitled to realise the whole amount of the decree at once. It was held that such a decree could not be considered to be a decree payable "at a certain date" within the meaning of this Section, and that therefore, after 12 years from the date of the default, only that instalment will be barred in respect of which the default was made.

Where a decree is for delivery of possession of immovable property contingent on the non-payment of annuity, the decree-holder is not bound to execute for

4. ('35) AIR 1935 Pat 380 (381) : 14 Pat 816.

('21) AIR 1921 Pat 340 (340).

('18) AIR 1918 Pat 216 (217).

4a. ('36) AIR 1936 Oudh 266 (266) : 12 Luck 244.

5. ('25) AIR 1925 Bom 503 (504) : 49 Bom 695.

6. ('38) AIR 1938 Cal 25 (30) : I L R (1937) 2 Cal 373.

('29) AIR 1929 Cal 687 (689) : 57 Cal 789.

('85) 11 Cal 143 (145).

[But see ('12) 13 Ind Cas 88 (90) (Cal).]

7. ('26) AIR 1926 Lah 465 (466).

('89) 1889 Pun Re No. 200, page. 706. (Arrangement of parties in execution as to satisfaction of decree—Parties cannot be allowed to turn back upon it.)

[But see ('23) AIR 1923 Lah 678 (678). (Where a Court executing the decree records a compromise the original decree is not altered thereby and the period will still be calculated from the date of the decree.)]

8-9. ('31) AIR 1931 Nag 50 (51) : 27 Nag L R 150.

9a. ('39) AIR 1939 Sind 93 (96).

#### Note 12

1. ('91) 14 Mad 396 (398).

('89) 1889 Pun Re No. 159.

2. ('89) 16 Cal 16 (18, 19).

('82) 4 All 155 (156).

('32) AIR 1932 All 273 (282) : 54 All 573 (F B).

3. ('92) 1892 Pun Re No. 13, page. 64 (F B).

(Instalment decree—Execution can be taken for instalments not barred.)

('85) 9 Bom 328 (332).

4. ('87) 9 All 33 (34).

('31) AIR 1931 Bom 492 (494). (Amount of maintenance directed to be determined in execution—Time runs from date of such determination.)

('92) 19 Cal 139 (144, 145, 146) (F B).

('94) 16 All 179 (181).

('95) 22 Cal 903 (908).

('10) 6 Ind Cas 826 (829) : 38 Cal 13.

5. ('94) 1894 Pun Re No. 89.

('88) 12 Bom 65 (67). (Right to execute accruing on a particular day—Limitation should be computed from that day.)

('07) 30 Mad 504 (505).

('24) AIR 1924 All 263 (264) : 46 All 73.

6. ('85) 7 All 373 (375). (Decree by instalments.)

('19) AIR 1919 Cal 322 (323).

('25) AIR 1925 Bom 326 (326).

('31) AIR 1931 Bom 263 (264). (Option given and exercised.)

6a. ('36) AIR 1936 Lah 159 (160).:-

possession on the occurrence of the first default but might execute it on the occurring of any subsequent default.<sup>7</sup>

Where a decree directs that money be recoverable from a party only on failure to recover the same from another, the period of 12 years runs from the date of decree and not from the time of the failure of the other to make the payment.<sup>8</sup>

**13. Exclusion of time during minority or other disability of decree-holder.** — See Section 6 Note 21 of the Authors' Commentaries on the Limitation Act.

**14. Deduction of time for other causes.** — Where the period of twelve years expires on a day when the Court is closed, the application can be presented on the next re-opening day on the broad principle that where the parties are prevented from doing a thing by the act of the Court they are entitled to do it at the first subsequent opportunity.<sup>1</sup>

As to whether the Sections of the Limitation Act extending the period of limitation "prescribed" apply to the period of twelve years under this Section, see the Authors' Commentaries on the Limitation Act<sup>2</sup> and the undermentioned cases.<sup>2a</sup>

In cases of intervening insolvency of the judgment-debtor the period during which the adjudication lasts will be excluded in computing the period of twelve years under this Section.<sup>3</sup>

By virtue of Section 48 of the Dekkhan Agriculturists' Relief Act, 1879, the time spent in obtaining the conciliator's certificate can be deducted in computing the period of limitation under this Section.<sup>4</sup>

Where property is under the management of the Collector under Schedule III of the Code, the period of such management can be excluded under Para. 11 (3) of Schedule III in calculating the "period of limitation" applicable to the execution of any decree in respect of any remedy of which the decree-holder has been temporarily deprived. The expression "period of limitation" has been interpreted as including the period fixed by Section 48.<sup>5</sup> But Para. 11 (3) only applies when the decree has been transferred to the Collector for execution<sup>6</sup> and only in respect of any remedy of which the decree-holder is temporarily deprived.<sup>7</sup>

The pendency of an appeal by the judgment-debtor is not a ground of suspension of the period prescribed by this Section in the absence of fraud or force.<sup>8</sup> When a decree is conditional on the redemption of a prior mortgage and the decree-holder redeemed the prior mortgage after twelve years from the date of his decree, the period up to the date of the redemption is not excluded, as nothing prevented him from redeeming it earlier and applying for execution within time.<sup>9</sup>

7. ('94) 16 All 237 (238, 239).

8. ('26) AIR 1926 Mad 20 (23) : 48 Mad 846.

**Note 14**

1. ('91) 18 Cal 631 (634).

('85) 7 All 107 (108).

('99) 22 Mad 179 (182).

('16) 3 Cal L Jour 339 (343).

2. See Note 3 to S. 4; Note 3 to S. 15; Note 15 to S. 19; Note 10 to S. 20.

2a. ('39) AIR 1939 All 403 (405, 412) (F B).  
(Following 1 Cal 226 (P C).)

('39) AIR 1939 Bom 75 (77) : 1 L R (1939) Bom 87. (Dissenting from AIR 1922 Mad 268.)

3. ('39) AIR 1939 Mad 270 (272).

('21) AIR 1921 Cal 456 (457).

('12) 16 Ind Cas 541 (542) (Cal).

('32) AIR 1932 Oudh 69 (71):7 Luck 397. (S. 48 is controlled by S. 78(2), Provincial Insolvency Act.)

4. ('18) AIR 1918 Bom 187 (188) : 42 Bom 367.

5. ('37) 1937 Oudh W N 1116 (1117).

('34) AIR 1934 Oudh 465 (470).

('19) AIR 1919 All 64 (65) : 42 All 118.

('10) 8 Ind Cas 377 (378) : 13 Oudh Cas 303.

[See also ('95) 19 Bom 261 (267, 268). (Remittances by Collector—Step-in-aid.)

6. ('15) AIR 1915 Mad 449 (451).

('16) AIR 1916 Mad 972 (972).

7. ('15) AIR 1915 Nag 103 (106) : 11 Nag L R 25.

8. ('17) AIR 1917 Cal 460 (461).

9. ('13) 18 Ind Cas 897 (897) (All).

8

15. "By fraud or force." — Sub-section (2) (a) of this Section permits the execution of a decree at any time within twelve years after the date on which the judgment-debtor has by fraud or force prevented the execution of a decree in an application properly made for execution. In other words, fraud or force which prevents execution gives a fresh period of twelve years within which the decree may be executed.<sup>1</sup> In order to get the benefit of this sub-section it must be proved that —

(1) there was fraud or force on the part of the judgment-debtor,<sup>2</sup> and

(2) the decree-holder was thereby prevented from executing the decree.<sup>3</sup>

The fraud however need not be such as to have continued to prevent execution up to the expiry of the twelve years.<sup>4</sup> There is a conflict of opinion on the question whether the Court has any discretion to refuse execution even when fraud or force on the part of the judgment-debtor preventing execution is established within twelve years of the application. According to the Calcutta High Court<sup>5</sup> the Court has such discretion which will be exercised in favour of the decree-holder if he had been *diligent* in proceeding with the execution of the decree from the date of the decree. The Madras High Court is, on the other hand, inclined to the view that no such discretion exists under the Section.<sup>6</sup> The Oudh Judicial Commissioner's Court has held<sup>7</sup> that even in the view of the Calcutta High Court stated above, the due diligence required is nothing more than keeping the decree alive under the provisions of the Code. It is submitted with respect that the Madras view is correct. The language of the sub-section makes it clear that sub-section (1) which precludes the Court from ordering execution in the cases specified does not bar an application made after the specified period if the conditions mentioned in sub-section (2) are satisfied. There is nothing to show that the Court has any *discretion* in the matter.

The term "fraud" in the Section should be interpreted in a very liberal sense.<sup>8</sup> Any improper means resorted to by the judgment-debtor to prevent execution of the decree would amount to such fraud.<sup>9</sup> The term includes not merely deceit but also circumvention.<sup>10</sup> But mere objections by the judgment-debtor cannot be taken advantage of as "fraud" within the meaning of this Section.<sup>11</sup> In the case noted below<sup>11a</sup> an objection raised to the jurisdiction of the Court was held not to amount to fraud.

#### Note 15

1. ('99) 22 Mad 320 (322, 323).

('11) 11 Ind Cas 672 (672) : 34 All 20.

('20) AIR 1920 Nag 68 (69).

('10) 8 Ind Cas 805 (805) (Mad.)

2. ('10) 8 Ind Cas 805 (805) (Mad.)

('35) AIR 1935 Mad 8 (11) : 58 Mad 311. (Fraud committed by judgment-debtor—Decree-holder can avail of it against legal representative.)

[See also ('32) AIR 1932 All 273 (277, 284) : 54 All 573 (F B).]

3. ('35) AIR 1935 Pat 380 (382) : 14 Pat 816.

('29) AIR 1929 Pat 597 (599).

('98) 8 Mad L Jour 203 (204).

('09) 4 Ind Cas 958 (959) (Lah).

('12) 13 Ind Cas 88 (89) (Cal).

('19) AIR 1919 Mad 197 (198).

[But see ('35) AIR 1935 Mad 8 (11) : 58 Mad 311. (Case law of Madras High Court discussed.)]

4. ('11) 12 Ind Cas 793 (795) : 14 Oudh Cas 238.

('97) 1 Cal W N clxii.

('99) 22 Mad 320 (322, 323).

('19) AIR 1919 Mad 197 (198).

5. ('06) 11 Cal W N 440 (441).

6. ('11) 12 Ind Cas 679 (681) : 35 Mad 670. (Even assuming due diligence is necessary, continuous diligence during all the time prior to the application need not be shown.)

7. ('11) 12 Ind Cas 793 (795) : 14 Oudh Cas 238.

8. ('12) 18 Ind Cas 1008 (1008) (Mad).

('12) 13 Ind Cas 88 (89) (Cal). (The term "fraud" in S. 48 should be interpreted in a wider sense than that in which it is used in English law.)

('31) AIR 1931 All 31 (33).

('11) 12 Ind Cas 679 (680) : 35 Mad 670.

9. ('36) AIR 1936 Lah 843 (845). (Frivolous objection taken by the judgment-debtor was held to amount to fraud.)

('19) 18 Ind Cas 1008 (1008) (Mad).

10. ('36) AIR 1936 Lah 843 (845).

('27) AIR 1927 All 668 (669).

11. ('35) AIR 1935 Pat 380 (382) : 14 Pat 816.

('27) AIR 1927 All 668 (669).

('31) AIR 1931 All 134 (134) : 53 All 419.

11a. ('36) AIR 1936 Lah 843 (845).

But raising a plea based on a false statement would be fraudulent.<sup>11b</sup> Where there are frequent futile and false objections raised by the judgment-debtor accompanied by his keeping out of the way when warrants of arrest are issued, his conduct may be taken to amount to fraud.<sup>12</sup> In the following instances the conduct of the judgment-debtor has been held to amount to fraud within the meaning of the Section —

- (1) Where he raised frivolous objections in order to delay execution of the decree against him.<sup>13-14</sup>
- (2) Where he wilfully evaded the arrest warrant.<sup>15</sup>
- (3) Where, knowing that a warrant of attachment was issued against his moveable property, he locked up his house and so prevented the moveable property therein being attached.<sup>16</sup>
- (4) Where he or his heirs made fictitious and fraudulent alienation of property which was subsequently set aside in a regular suit.<sup>17</sup>
- (5) Where he kept out of British India so that the decree-holder was not in a position to take out execution against his person.<sup>18</sup>

Where the Court merely refused to permit execution against properties of the judgment-debtor in the hands of a receiver but it was open to the decree-holder to proceed against the person and other properties of the judgment-debtor or of the surety and he did not do so within the twelve years, it was held that Section 48 (2) was of no help to the decree-holder.<sup>19</sup>

Fraud or force of one judgment-debtor will not extend the time against a co-judgment-debtor who did not resort to it.<sup>20</sup>

**16. Appeal from orders under the Section.** — An order granting or refusing execution of a decree under the Section is, it is conceived, a final order amounting to a decree under Section 47 and is therefore appealable.

**17. Plea of bar under the Section, when to be raised.** — Where notice of petition for attachment in execution is duly served on the judgment-debtor who allows orders to be passed *ex parte*, he cannot ask for a review of the order, nor can he in appeal raise the plea that the execution application is barred by the expiry of the

11b. ('36) AIR 1936 Lah 843 (845). (But mere raising of objections so as to prolong execution proceedings beyond the period of limitation is not necessarily fraud.)

12. ('12) 13 Ind Cas 929 (929) (All).

('83) 6 Mad 365 (367).

('09) 2 Ind Cas 222 (223) (All).

13-14. ('11) 12 Ind Cas 793 (794, 795): 14 Oudh Cas 238. (It is sufficient to show that the judgment-debtor on various occasions within the aforesaid period dishonestly prevented the execution of the decree against him by frivolous devices.)

('34) AIR 1934 Pat 532 (533). (The judgment-debtor fraudulently setting up a claimant to the attached property—Claim set aside by separate suit.)

('22) AIR 1922 All 145 (146): 44 All 319.

('17) AIR 1917 Oudh 69 (71).

[But see ('12) 13 Ind Cas 88 (89) (Cal). (The mere fact that the judgment-debtor objects to

a sale which objection ultimately proves unsuccessful will not amount to fraud.)]

15. ('20) AIR 1920 Mad 492 (493).

('24) AIR 1924 Mad 836 (837).

('12) 13 Ind Cas 929 (929) (All).

16. ('85) 9 Bom 318 (319).

('99) 22 Mad 320 (322, 323).

[But see ('17) AIR 1917 Oudh 159 (160). (Keeping the doors closed is per se no evidence at all of fraudulent conduct on the part of a lady, unless there is anything to show that she deliberately does so or attempts to do so against the executing officer.)]

17. ('82) 4 Mad 292 (294).

18. ('25) AIR 1925 Nag 82 (90): 22 Nag L R 67.

19. ('29) AIR 1929 Pat 597 (599).

20. ('16) AIR 1916 Mad 1 (2): 38 Mad 419.

('31) AIR 1931 Mad 381 (383).

('30) AIR 1930 Sind 218 (219).

twelve years under the Section.<sup>1</sup>

Where an executing Court decides that the execution of a decree is not barred, notwithstanding the provisions of this Section, it is merely an erroneous decision and not an illegal exercise of jurisdiction. Therefore, so long as the order is not set aside in appeal or revision, it cannot be attacked in any collateral proceeding on the ground of want of jurisdiction in the executing Court.<sup>2</sup>

## TRANSFEREES AND LEGAL REPRESENTATIVES

**Transferee.**

**49. [S. 233.]** Every transferee of a decree shall hold the same subject to the equities (if any) which the judgment-debtor might have enforced against the original decree-holder.

[1877, S. 233. See O. 21 R. 16.]

### *Synopsis*

1. Scope and object of the Section.
2. Equity of the judgment-debtor to set off cross-decree.
3. Transferee during pendency of suit by judgment-debtor takes it subject to the result of the suit.
4. Other equities enforceable against the assignee.
5. Assignee's want of knowledge of equity, if affects rule.

### *Other Topics*

Assignment before or during appeal. See Note 3.

Assignee bound by S. 99, T. P. Act. See Note 4.

**1. Scope and object of the Section.** — This Section may be compared with Section 132 of the Transfer of Property Act, 1882, which is based on the same principle,<sup>1</sup> namely, that the assignee of a claim stands in no better position than the assignor as regards equities existing between the assignor and his debtor at the time of the assignment.<sup>1a</sup> An attaching decree-holder is an "assignee" of the attached decree within the meaning of O. 21 R. 16 and is, under this Section, subject to the same equities that the judgment-debtor in attached decree had against his decree-holder.<sup>2</sup> The equity, to which a transfer of a decree is subject, must, however, be one available against the *original decree-holder* and not one available against others.<sup>3</sup> A mere *claim* for restitution made by the judgment-debtor against the original decree-holder is not an equity which can be availed of against an assignee from the decree-holder.<sup>4</sup> The equity which the judgment-debtor seeks to enforce against the transferee must have been existent at the date of the assignment.<sup>5</sup>

#### **Note 17**

1. ('29) AIR 1929 Mad 826 (826, 827).

[But see ('38) AIR 1938 All 89 (90). (Objection as to bar not raised on notice of application for execution—Objection to confirmation of sale on the ground that execution was barred by limitation, allowed to be raised.)]

2. ('34) AIR 1934 Cal 282 (283): 61 Cal 234.

#### **Section 49 — Note 1**

1. Section 132 of the Transfer of Property Act runs as follows: "The transferee of an actionable

claim shall take it subject to all the liabilities and equities to which the transferor was subject in respect thereof at the date of transfer."

- 1a. ('10) 7 Ind Cas 55 (59, 60) (Cal). (Fraudulent assignment.)

('74) 21 Suth W R 141 (143).

2. ('25) AIR 1925 Cal 102 (103).

3. ('25) AIR 1925 Pat 449 (450): 4 Pat 120.

4. ('33) AIR 1933 Cal 865 (868).

5. ('38) AIR 1938 Bom 253 (255, 256): 1 L R (1938) Bom 263.

**2. Equity of the judgment-debtor to set off cross-decree.** — A right to set off a cross-decree or cross-claim under O. 21 Rr. 18 and 19 is an equity which can be enforced against the transferee of the decree,<sup>1</sup> but the decree against which the set-off is asked for must be before the Court for execution<sup>2</sup> and it is *that* Court that should consider whether the assigned decree is subject to any equities.<sup>3</sup> A right to set off a cross-decree is not affected when the assignment of one of them has been found to be fraudulent.<sup>4</sup>

**3. Transferee during pendency of suit by judgment-debtor takes it subject to the result of the suit.** — An assignee of a decree which, subsequent to the assignment, is confirmed on appeal without the assignee being brought on the record, is nevertheless an "assignee" within O. 21 R. 16 who can execute the appellate decree<sup>1</sup> but a satisfaction entered on the decree under O. 21 R. 18 is binding on him though made subsequent to the assignment to him and before his name is brought on the record.<sup>2</sup> The right of a judgment-debtor to ask for a stay under O. 21 R. 29, *infra* is an equity which will bind an assignee of the decree.<sup>3</sup> Hence, where the decree is assigned during the pendency of a suit by the judgment-debtor against the decree-holder and a decree is passed subsequently in the later suit in favour of the judgment-debtor, the latter will be entitled to a set-off in respect of such decree against the transferee of the decree in the prior suit.<sup>4</sup>

**4. Other equities enforceable against the assignee.** — In cases coming under Section 99 of the Transfer of Property Act, 1882, a mortgagee who had also a money decree against the mortgagor could not, in execution of the *money* decree, bring the equity of redemption to sale. It was held by the Bombay, Calcutta and Madras High Courts that the assignee of such money decree could not also bring the equity of redemption to sale and thus deprive the mortgagor of his equitable right.<sup>1</sup> The Allahabad High Court, however, held a contrary view.<sup>2</sup> Section 99 of the Transfer of Property Act, 1882, has now been repealed and re-enacted in O. 34 R. 14 of the Code but with this difference, namely, that the equity of redemption could not be sold now in execution of decrees for the payment of money in satisfaction of *such claims only as arise under the mortgage*. The cases cited above are, therefore, now no longer law.

See Notes to Order 34 Rule 14, *infra*.

**5. Assignee's want of knowledge of equity, if affects rule.** — An assignment takes effect against the *debtor* only on notice to him and is subject to all

**Note 2**

1. ('37) AIR 1937 All 351 (352) : I L R (1937) All 553. (This Section is not inconsistent with O. 21 R. 18 and even if it is so, this Section will prevail.)
- ('36) 163 Ind Cas 618 (619).
- ('68) 10 Suth W R 32 (33) (F B).
- ('73) 19 Suth W R 85 (87).
- ('72) 18 Suth W R 442 (443).
- ('89) 16 Cal 619 (622).
- ('24) AIR 1924 Nag 46 (47) : 19 Nag L R 164.
2. ('02) 24 All 481 (482).
3. ('37) AIR 1937 Cal 570 (571).
- ('19) AIR 1919 Mad 424 (426) : 42 Mad 338. (Since so to determine is a stage in execution of the decree.)
4. ('67) 7 Suth W R 470 (471).

**Note 3**

1. ('18) AIR 1918 Mad 279 (280). (Because transfer of decree means transfer of interest in it as finally determined.)
2. ('97) 7 Mad L Jour 227 (229).
3. ('38) AIR 1938 Bom 253 (256) : I L R (1938) Bom 263.
4. ('38) AIR 1938 Bom 253 (256) : I L R (1938) Bom 263.
- ('37) AIR 1937 Rang 316 (317). (Want of notice on assignee's part of the pending suit is not material.)

**Note 4**

1. ('07) 31 Bom 462 (463, 464). (What law prohibits directly cannot be effected indirectly.)
- ('95) 22 Cal 813 (816). (Otherwise would defeat object of S. 99, T. P. Act, 1882.)
- ('07) 31 Mad 33 (34).
2. ('05) 27 All 450 (452).



equities arising prior to the date of such notice;<sup>1</sup> but it is not necessary that the assignee should have any notice of the equity which the debtor could have asserted against the transferor,<sup>2</sup> though the case would be very much stronger against the assignee if he had such notice.<sup>3</sup>

**50.** [S. 234.] (1) Where a judgment-debtor dies<sup>10</sup> before the decree has been fully satisfied,<sup>12</sup> the holder

Legal representative.

of the decree<sup>3</sup> may apply to the Court which passed it to execute the same against the legal representative<sup>4</sup> of the deceased.

(2) Where the decree is executed against such legal representative, he shall be liable only to the extent<sup>6</sup> of the property of the deceased<sup>8</sup> which has come to his hands and has not been duly disposed of; and, for the purpose of ascertaining such liability, the Court executing the decree may, of its own motion or on the application of the decree-holder, compel such legal representative to produce such accounts as it thinks fit.

[1877, S. 234; 1859, S. 210. See Order 21 Rule 22.]

### Synopsis

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| <ol style="list-style-type: none"> <li>1. Legislative changes.</li> <li>2. Scope of the Section.</li> <li>3. "Holder of the decree."</li> <li>4. "Legal representative." See O. 22 R. 3.</li> <li>5. Appeal against order determining legal representative.</li> <li>6. Extent of liability of legal representative. See Note 13 to Section 52.</li> <li>7. Legal representative bound by what the deceased judgment-debtor himself would have been bound by.</li> <li>8. "Property of the deceased." See Section 52 Note 9 and Section 53 Note 6.</li> <li>9. Official Assignee. See Note 10.</li> <li>10. "Where a judgment-debtor dies."</li> <li>11. Decree against deceased defendant. See Note 8 to Section 52.</li> </ol> | <ol style="list-style-type: none"> <li>12. "Before the decree has been fully satisfied."</li> <li>13. Application to execute against the legal representative.</li> <li>14. Execution against wrong legal representative or without the legal representative.</li> <li>15. Decree-holder, if can proceed against property in the possession of third party.</li> <li>16. Limitation for substitution of legal representative.</li> <li>17. Successive deaths of judgment-debtor and legal representative.</li> <li>18. Decree for injunction.</li> <li>19. Appeals.</li> </ol> |
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**1. Legislative changes.** — Besides some verbal changes, the words "fully satisfied" have been substituted for the words "fully executed" in clause (1) of this Section. See Note 12 below.

**2. Scope of the Section.** — This Section and Sections 52 and 53 may be usefully read together. Section 52 contemplates cases where the debtor dies *before the decree* and the *decree itself* has been passed against the legal representative. This will

#### Note 5

1. ('02) 26 Mad 428 (429).  
(1886) 26 S C 33, Sutton v. Sutton.
2. ('38) AIR 1938 Bom 253 (256) : I L R (1938) Bom 263.

- (1937) AIR 1937 Rang 316 (317).
- (1911) 12 Ind Cas 205 (206) (Low Bur).
- (1910) 7 Ind Cas 55 (60) (Cal).
3. ('89) 16 Cal 619 (622).

also include cases where the debtor dies *before suit* and the suit itself is instituted against the legal representative. This Section provides for the *execution* of decrees against the legal representatives of a judgment-debtor who dies before the decree has been fully satisfied. Normally, it applies to cases where judgment-debtor dies after the decree. But the Section is wide enough to include the case where the judgment-debtor dies before decree, provided the decree is *valid in spite of his death*, e.g., where under O. 22 R. 6 death occurs after hearing but before judgment, or in the case of Privy Council appeals.<sup>1</sup> Section 53 extends the scope of Sections 50 and 52 to ancestral property in the hands of a descendant which is liable under the Hindu law for payment of debts of the ancestor.

**3. "Holder of the decree."** — For the definition of "decree-holder," see Section 2 sub-section (3). A person who appears upon the face of the decree as the person in whose favour the decree is passed is entitled to execute it, unless it is shown that some other person has taken his place.<sup>1</sup> The Code does not provide that execution abates by death of decree-holder.<sup>2</sup> See also O. 22 R. 12 *infra*. For purposes of limitation, an application for execution by any person who, for the time being, is recognised as the proprietor of the estate of a deceased decree-holder is held to be good, though later on it is found that he had no title.<sup>3</sup>

**4. "Legal representative."** — See Order 22 Rule 3.

**5. Appeal against order determining legal representative.** — An order determining the question whether a person is the legal representative of a deceased party is within Section 47 and is appealable as a decree. See Section 47 sub-section (3), and Note 26 to that Section. If, however, the Court does not *decide* the question, the mere placing of the legal representative on the record is not appealable.<sup>1</sup>

Where a legal representative is brought on the record in the place of a deceased party, he becomes a party to the suit<sup>2</sup> and all further questions in execution between him and the opposite party must be decided in execution and not by a separate suit and an appeal will lie from such a decision.<sup>3</sup>

**6. Extent of liability of legal representative.** — See Note 13 to Section 52.

**7. Legal representative bound by what the deceased judgment-debtor himself would have been bound by.** — The liability of the legal representative is co-extensive with that of the deceased judgment-debtor himself, subject, however, to the condition that it does not extend beyond the assets actually received by him *and which have not been duly disposed of*. Thus, where the property could not be proceeded against even when in the hands of the judgment-debtor, as where it is governed by the special provisions of the Dekkhan Agriculturists' Relief Act, it cannot be proceeded against when it comes into the hands of the legal representative.<sup>1</sup> On the other hand,

#### Section 50 — Note 2

1. ('37) AIR 1937 Pat 321 (322): 16 Pat 316.
- ('32) AIR 1932 Pat 261 (262, 263, 264): 11 Pat 445.

#### Note 3

1. ('91) 18 Cal 639 (641). (Or may order to make over proceeds to any other person.)
2. ('78) 3 Bom 221 (222).
- (1900) 2 Bom L R 887 (888).
3. ('18) AIR 1918 Pat 216 (216, 217).

#### Note 5

1. ('78) 3 Cal 708 (709, 710).
- ('93) 1893 All W N 106 (107).
- [See ('23) AIR 1923 Pat 149 (150). (Impleading

legal representative without deciding his liability for decree held illegal.)]

2. ('72) 18 Suth W R 185 (188).
- ('84) 7 Mad 255 (257, 258).
3. ('22) AIR 1922 Bom 280 (280).
- (1900) 2 Bom L R 887 (888).

#### Note 7

1. ('21) AIR 1921 Sind 29 (31, 32, 33, 34): 15 Sind L R 47.

[See also ('25) AIR 1925 Nag 449 (450). (By S. 11 (2) of the Central Provinces Act, 1920, no sale of such tenancy is valid except in special circumstances.)]

the legal representative will be bound by the decree passed or the previous proceedings taken, against the judgment-debtor himself.<sup>2</sup> Thus, where the properties had been attached or charged or mortgaged, or directed to be sold by the decree, in the lifetime of the judgment-debtor, they continue to be liable in the hands of the legal representatives.<sup>3</sup> Similarly, where the judgment-debtor was impleaded in the suit as a subsequent mortgagee but did not plead his rights of marshalling, it is not open to his legal representatives, when substituted in execution proceedings, to raise the question again.<sup>4</sup> A Hindu son or a descendant of a Hindu is liable just like other legal representatives, and cannot question the validity of the decree against the ancestor,<sup>5</sup> except in one respect, namely, that the decree debt is of an illegal or immoral nature so as not to bind him or his share in the joint family property under the Hindu law. See Section 53, Notes 1 and 3, *infra*.

8. "Property of the deceased." — See Section 52 Note 9 and Section 53, Note 6.

9. Official Assignee. — See Note 10 below.

10. "Where a judgment-debtor dies." — This Section applies only where the judgment-debtor dies.<sup>1</sup> The word "dies" is used in its natural meaning and does not include a *civil death*.<sup>1a</sup> Consequently, the Section has no application where the judgment-debtor only becomes an insolvent or has only alienated or gifted away his property, or where, in his lifetime, there is a transfer or devolution by operation of law. After property vests in the Official Assignee, no proceedings can affect the property of the deceased insolvent in his hands unless he has been impleaded in the matter adjudicated upon.<sup>2</sup> Since attachment does not create any interest in the property and prevents only a private alienation, it does not prevail against the Official Assignee or Official Receiver and the decree-holder cannot claim payment of the money realised,<sup>3</sup> much more so if the attachment is only prior to judgment.<sup>4</sup>

11. Decree against deceased defendant. — See Note 8 to Section 52.

12. "Before the decree has been fully satisfied." — The word "satisfied" has been substituted in this Code for the word "executed" in the previous Codes. Prior to this Code, there was a conflict of views amongst the High Courts as to the meaning

('69) 12 Suth W R 495 (495). (A decree to give accounts within specified time—No execution till expiry of the period—Death thereafter—Cannot be executed against legal representative.)

('19) AIR 1919 Lah 145 (146): 1919 Pun Re No. 17 (F B). (A case under Punjab custom.)]

2. ('18) AIR 1918 Pat 41 (46): 4 Pat L Jour 213.

('86) 10 Bom 74 (77).

('89) 21 All 277 (279).

3. ('01) 24 Mad 689 (694).

('09) 31 All 45 (47). (Mortgage decree against widow—Reversioner as her legal representative cannot plead in execution the invalidity of mortgage or decree.)

('99) 21 All 356 (358, 359). (Mortgage decree against Hindu father covering whole family property — Son as legal representative cannot object in execution that his share is not liable.)

4. ('16) AIR 1916 Oudh 288 (288, 289).

5. ('93) 16 Mad 99 (103).

('11) 9 Ind Cas 648 (649) (Mad).

Note 10

1. ('14) AIR 1914 Mad 328 (330): 38 Mad 1120.

(Property obtained by son on partition—Not "assets" within this Section so long as the father is alive.)

1a. ('35) AIR 1935 Cal 713 (714).

('31) AIR 1931 All 306 (307): 53 All 529.

[See also ('03) 30 Cal 961 (964). (Transfer of all its properties by one limited company to another—Former company cannot be said to have died.)]

2. ('35) AIR 1935 Mad 907 (907, 908). (Property of a person who is adjudicated an insolvent vests in the Official Receiver from the date on which the person applies for insolvency.)

('29) AIR 1929 Mad 609 (611).

('14) AIR 1914 P C 129 (130, 131): 42 Cal 72:41 Ind App 251 (P C).

[But see ('70) 14 Suth W R 33 (35, 36) (F B). (Not good law: see 29 Cal 428 (F B).)]

3. ('85) 8 Mad 554 (556).

('02) 29 Cal 428 (432, 433) (F B).

See also S. 64, Notes 10 and 14.

4. ('84) 10 Cal 150 (157, 158) (F B).

certain powers for the purposes of the Section. Now the executing Court may be the Court which passed the decree or it may be the Court to which it is sent for execution.<sup>2</sup> The application to execute the decree against the legal representative must under cl. (1) be made to the Court *which passed the decree*.<sup>3</sup> The Section, however, does not specify which Court has to *pass orders thereon*. At any rate the Court that passed the decree need only decide one point, viz., whether the decree is executable against the legal representative, and pass orders accordingly.<sup>4</sup> All further proceedings, inclusive of ordering notice of execution can, where the decree is sent to another Court for execution, be taken by the Court executing the decree.<sup>5</sup> As to the effect of non-compliance with the rule that the application for substitution should be made to the Court which passed the decree, see Section 42, Note 1 *ante*. See also the case cited below.<sup>6a</sup> The execution proceedings once commenced can be continued after the death of the judgment-debtor by substitution of the name of his legal representative in place of his name in the application for execution. No fresh or substantive application under O. 21 R. 11 is necessary.<sup>6</sup>

An application under this Section is necessary only when *further* execution is needed or asked for. A separate application merely for substituting a legal representative is not necessary<sup>7</sup> and no limitation is prescribed for such substitution in execution proceedings which do not abate merely by the death of the parties.<sup>8</sup> See O. 22 R. 12.

It is not incumbent on a party, to be entitled to apply under O. 9 R. 13 of the Code as the legal representative of the deceased defendant, to be first brought on record under Section 50 before filing an application to set aside the *ex parte* decree.<sup>9</sup>

**14. Execution against wrong legal representative or without the legal representative.** — It has been seen in Note 63b to Section 11, *ante*, that a decree against one of several representatives will, in the absence of fraud or collusion, bind all the representatives, but that a decree against a *wrong person* as the legal representative does not bind the real representatives. The same principles will apply to execution proceedings taken against legal representatives. Thus, a proceeding taken

2. See Sections 37 and 38 *supra*.

3. ('37) AIR 1937 Pat 239 (241). (A I R 1928 P C 162 relied on).

(84) AIR 1934 Bom 215 (216). (Application to bring on record legal representatives of judgment-debtor is to be made to the Court passing the decree and not to the Court to which decree is sent for execution.)

('05) 28 Mad 466 (471, 472) (F B).

('95) 17 All 431 (432).

('94) 18 Bom 224 (226). (Although notice to party be sent by execution Court.)

('07) 17 Mad L Jour 300 (301). (Order passed by execution Court not void if objection waived by parties.)

('12) 17 Ind Cas 293 (294) (Mad).

('26) AIR 1926 Mad 411 (412).

4. ('05) 28 Mad 466 (470).

('95) 17 All 431 (432). (Execution Court may determine extent of legal representative's liability.)

('26) AIR 1926 Mad 411 (412).

('28) AIR 1928 Rang 40 (42) : 5 Rang 775. (The order permitting execution against the legal representatives can be made *ex parte*.)

5. ('94) 18 Bom 224 (226).

5a. ('38) AIR 1938 Rang 385 (387). (Question as to whether application to add legal representa-

tive of a deceased judgment-debtor should be made to the Court passing decree or to Court which is executing decree is one of procedure and not one of jurisdiction — In case of non-compliance with procedure the defect might be waived.)

6. ('36) AIR 1936 Bom 456 (457).

('09) 4 Ind Cas 839 (841) : 34 Bom 142.

('31) AIR 1931 Mad 303 (312).

('05) 2 Cal L Jour 544 (545).

('30) AIR 1930 Sind 16 (17).

See also Note 4 to Section 146 *infra*.

7. ('36) AIR 1936 Oudh 152 (153) : 11 Luck 500.

('21) AIR 1921 Mad 693 (693). (Execution was unnecessary for 20 years — Decree-holder not barred.)

[See also ('33) AIR 1933 Mad 568 (568, 569).

(Application for execution against legal representative under this Section need not contain a prayer for substitution of the legal representative on the record.)]

8. ('20) AIR 1920 All 171 (172) : 42 All 570.

9. ('25) AIR 1925 Oudh 370 (371) : 27 Oudh Cas 299. (Provisions of S. 146 the same.)

[But see ('05) 28 Mad 361 (362). (Under old Code and not good law now in view of S. 146.)]

against one of several representatives who *prima facie* is entitled to represent the estate of the deceased is binding on all the representatives.<sup>1</sup> But if it is taken against a *wrong person* as such legal representative, it will as a general rule not bind the actual or real legal representatives.<sup>2</sup> (See also Note 6 to Section 52.) Where, however, in such a case the real representative stands by and allows the proceedings to be taken or continued against a wrong person *who is allowed to be in possession* of the estate of the deceased, he and persons claiming through him will not be allowed to challenge the proceedings subsequently.<sup>3</sup>

Similarly, where a wrong person is impleaded as a legal representative but the Court decides that he is the true heir and orders execution to proceed, such proceedings cannot be said to be void for want of jurisdiction.<sup>4</sup>

Another class of cases may be noted in this connexion, namely, cases where one person is competent, in law, to represent the interest of others in the estate, as for instance, a Hindu father or manager of a joint Hindu family, or the guardian of a minor, or a Hindu widow; in all these cases the proceedings taken against such persons in their representative capacity are binding on all persons who are represented by the person against whom such proceedings are taken.<sup>5</sup> But if the proceedings are

#### Note 14

1. ('79) 4 Cal 342 (345).  
('09) 4 Ind Cas 1059 (1060) : 33 Mad 6.  
('17) AIR 1917 Mad 979 (980, 981). (Position justified on the analogy of S. 11, Expl. 6.)  
('16) AIR 1916 Mad 1022 (1024). (Representation must be without fraud and collusion.)  
('25) AIR 1925 Oudh 330 (331, 334, 336, 337) : 28 Oudh Cas 177. (The same law applies to Mahomedans also.)  
('03) 30 Cal 1044 (1057 to 1059). (Residuary legatee in possession.)  
('89) 12 Mad 90 (91).  
('03) 26 Mad 230 (234).  
[But see ('79) 4 Cal 142 (156) (F B).  
('82) 11 Cal L R 268 (272).]
2. ('05) 32 Cal 296 (315) : 32 Ind App 23 (P C).  
('10) 32 All 404 (409).  
('10) 6 Ind Cas 627 (629) (Cal).  
('11) 12 Ind Cas 915 (918) : 34 All 79.  
('85) 9 Bom 86 (93). (But legal representatives must not wilfully put forward 'wrong person' as legal representatives.)  
('85) 9 Bom 429 (432). (Decree against widow when minor son ignored — Widow does not represent minor son.)  
('97) 21 Bom 424 (451) (F B).  
('13) 18 Ind Cas 381 (382) (Bom).  
('95) 22 Cal 903 (903).  
(1900) 27 Cal 242 (258).  
('13) 21 Ind Cas 519 (519) (Cal).  
('16) AIR 1916 Cal 661 (662).  
('19) AIR 1919 Cal 831 (833).  
('22) 70 Ind Cas 886 (887) (Cal).  
('88) 11 Mad 408 (410, 411).  
('16) AIR 1916 Mad 726 (727).  
(1894) 1894 App Cas 437 (442), Mohamadu Mohideen v. Pitchay. (Creditor of deceased debtor cannot sue unless a person intermeddles with estate or proves a will.)  
('12) 16 Ind Cas 690 (691, 692) (Cal).  
('05) 2 Cal L Jour 484 (486, 487, 483, 483).

- ('09) 2 Ind Cas 818 (819) (Cal). (Case under Probate and Administration Act.)  
('02) 4 Bom L R 340 (341).  
('17) AIR 1917 Mad 979 (980, 981).  
('21) AIR 1921 Bom 385 (388, 389) : 45 Bom 1186. (Sale in absence of and without notice to legal representatives.)  
('81) 6 Cal 777 (784, 785). (Where on widow's death a person is impleaded as her legal representative without deciding if he was really so or not.)
3. ('79) 3 Cal L Rep 157 (158).  
('79) 4 Cal 342 (345, 346).  
[See also ('16) AIR 1916 Mad 1022 (1024). (Wrong representative bona fide sued—Legatee was held bound by decree.)]
4. ('01) 25 Bom 337 (347) : 27 Ind App 216 (P C). (Because Court has jurisdiction to decide wrong as well as right.)  
('25) AIR 1925 Oudh 330 (334) : 28 Oudh Cas 177. (Decree against ostensible owner binds true owner.)  
('26) AIR 1926 Oudh 613 (614). (25 Bom 337 (P C), Followed.)
5. ('72) 24 Suth W R 109 (109).  
('81) 3 All 517 (519). (For limitation purposes.)  
('88) 12 Bom 48 (50). (Do).  
('88) 12 Bom 101 (103).  
('90) 14 Bom 597 (603). (Manager.)  
('96) 20 Bom 338 (344, 345). (Principle applies to Mahomedans also.)  
('97) 21 Bom 539 (542, 543). (Minor son represented by widow.)  
(1900) 24 Bom 135 (147).  
('87) 15 Cal 70 (81) : 14 Ind App 157 : 2888 Bom Re No. 1 (P C). (Managing members of joint family.)  
('89) 12 Mad 90 (91). (Mahomedan father.)  
('73) 10 Mad 432 (439). (Case under Probate Act.)  
('24) AIR 1924 Bom 385 (388, 389). (Sale in absence of and without notice to legal representatives.)  
('03) 2 Ind Cas 818 (819). (Case under Probate and Administration Act.)

will be bound by the doctrine of *lis pendens* and the decree can consequently be enforced against him.<sup>4</sup>

**19. Appeals.** — Orders under this Section are appealable if the conditions of Section 47 are satisfied.<sup>1</sup> See also Note 5 above, and Note 84 to Section 47.

## PROCEDURE IN EXECUTION

Powers of Court to  
enforce execution.

**51.** Subject to such conditions and limitations as may be prescribed, the Court may, on the application of the decree-holder, order execution of the decree —

- (a) by delivery of any property specifically decreed;
- (b) by attachment and sale or by sale without attachment of any property;
- (c) by arrest and detention in prison;
- (d) by appointing a receiver; or
- (e) in such other manner as the nature of the relief granted may require:

*“Provided that, where the decree is for the payment of money, execution by detention in prison shall not be ordered unless, after giving the judgment-debtor an opportunity of showing cause why he should not be committed to prison, the Court, for reasons recorded in writing, is satisfied, —*

*(a) that the judgment-debtor, with the object or effect of obstructing or delaying the execution of the decree, —*

*(i) is likely to abscond or leave the local limits of the jurisdiction of the Court, or*

*(ii) has, after the institution of the suit in which the decree was passed, dishonestly transferred, concealed, or removed any part of his property, or committed any other act of bad faith in relation to his property; or*

*(b) that the judgment-debtor has, or has had since the date of the decree, the means to pay the amount of the decree or some substantial part thereof and refuses or neglects or has refused or neglected to pay the same, or*

4. ('27) AIR 1927 Bom 93 (95): 51 Bom 37.

### Note 19

1. ('87) 1887 Pun Re No. 87, p. 183.

('73) 20 Suth W R 280 (282, 283).

('87) 9 All 605 (608).

('90) 12 All 313 (327).

('91) 13 All 290 (294, 295). (Costs by legal representative improperly impleaded.)

('89) 16 Cal 1 (6, 7, 8). (Questions of liability of the

property to be taken in execution in the hands of legal representative are within S. 47.)

('89) 16 Cal 603 (605, 609).

('90) 17 Cal 711 (720, 721) (F B).

('84) 7 Mad 255 (257, 258).

('87) 10 Mad 117 (120).

('03) 26 Mad 501 (501, 502).

('21) AIR 1921 Sind 29 (32): 15 Sind L R 47.

('28) AIR 1928 Rang 40 (41): 5 Rang 775.

(c) that the decree is for a sum for which the judgment-debtor was bound in a fiduciary capacity to account.

*Explanation.*—In the calculation of the means of the judgment-debtor for the purposes of clause (b), there shall be left out of account any property which, by or under any law or custom having the force of law for the time being in force, is exempt from attachment in execution of the decree.

[ See O. 21 Rr. 30 to 34, 35, 53, 56 and 64; O. 40 R. 1; also Ss. 54 and 68 to 72.]

a. Proviso inserted by the Code of Civil Procedure (Amendment) Act, 1936 (XXI of 1936), S. 2.

### Synopsis

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| <ol style="list-style-type: none"> <li>1. Scope of the Section.</li> <li>1a. "Subject to such conditions and limitations as may be prescribed."</li> <li>2. Powers of the Court in execution.</li> <li>3. "By delivery of any property specifically decreed."</li> <li>4. "By attachment and sale or by sale without attachment of any property." — Clause (b).</li> </ol> | <ol style="list-style-type: none"> <li>5. "By arrest and detention."</li> <li>5a. Proviso to the Section.</li> <li>6. "By appointing a receiver." — Clause (d).</li> <li>7. "In such other manner," etc.</li> <li>8. "On the application of the decree-holder."</li> <li>9. Appeal.</li> </ol> |
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### Other Topics

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|---|---|
| <p>Decision of questions relating to execution. See S. 47.</p> <p>Executing Court, if can go behind decree. See Note 8 to Section 38.</p> <p>Simultaneous execution. See Note 2.</p> <p>Appointment of receiver to collect future maintenance. See Note 6.</p> <p>Power to sell includes power to order temporary alienation. See Note 4.</p> <p>Power to appoint decree-holder himself as receiver. See O. 40 R. 1, Note 11.</p> | <p>Receiver in respect of inalienable property. See Note 6.</p> <p>Receiver in respect of inalienable property where there are other hypotheca which can be sold. See O. 40 R. 1, Notes.</p> <p>Power of receiver to sue in a Court outside the jurisdiction of the Court appointing him. See Note 6; see also O. 40 R. 1 Note 12.</p> <p>Adjustments or agreements of parties relating to execution. See Note 7; see also O. 21 R. 2, Notes.</p> |
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**1. Scope of the Section.** — This Section was newly inserted in the Code on the suggestion of the Advocate-General of Madras.<sup>1</sup> It enumerates in general terms the various modes<sup>2</sup> in which the Court may, in its discretion, order the execution of a decree according as the nature of the relief granted may require. In the Notes on Clauses the Select Committee observe as follows: "This clause states generally the powers of the Court in regard to execution leaving the details to be determined by rules. It will be observed that the power to direct immediate execution is no longer restricted to one class of suits but that it is now general in terms. Any limitation that may be found necessary will be imposed by rules." The Section accordingly is made to operate "subject to such conditions and limitations as may be prescribed."

**1a. "Subject to such conditions and limitations as may be prescribed."** — This Section merely enumerates the different modes of execution in general

#### Section 51 — Note 1

1. ('19) AIR 1919 Oudh 326 (327): 22 Oudh Cas 194. (Receiver to collect rents—Mortgage decrees.)
2. ('36) AIR 1936 Pesh 209 (210). (Methods provided are distinct—Application for execution in one method is distinct from application for execution in another method.)

terms while the conditions and limitations under which alone the respective modes can be availed of are prescribed further on by different provisions. As observed by Sulaiman, C. J., in *Anadilal v. Ram Sarup*,<sup>1</sup> "The Legislature has taken care to preface the Section with the words 'subject to such conditions and limitations as may be prescribed.' It is obvious that there is no wide and unrestricted jurisdiction to order execution in every case in all the ways indicated therein. The jurisdiction has to be exercised subject to such conditions and limitations as may be prescribed by the rules in the following schedule . . . Obviously, all the various modes mentioned in Section 51 are not open to an executing Court in every case; it is to be guided by the procedure laid down in the schedule, and must resort to the method appropriate to each case."

"Prescribed" under Section 2 (16) means "prescribed by rules", and "rules," under Section 2 (18) means "rules and forms" contained in the First Schedule of the Code or framed by the respective superior Courts in different Provinces under Section 122 or Section 125.

**2. Powers of the Court in execution.** — It is for the *judgment-creditor* to decide in which of the several modes mentioned in the Section he will execute his decree; and the Court has no authority except under the circumstances mentioned in the proviso, to refuse to order execution of the decree in the mode asked for on the ground that the decree-holder should, in the first instance, proceed by another mode.<sup>1</sup> On the same principle, a Court passing a decree against a defendant should not ordinarily place any limitation as to the mode in which it is to be executed.<sup>2</sup> In fact, a decree may, under the provisions of O. 21 R. 30, be executed *simultaneously* against both the person and the property of the judgment-debtor,<sup>2a</sup> though the Court has, under O. 21 R. 21, a judicial discretion to refuse to order such simultaneous execution in proper cases. The reason is that, as their Lordships of the Privy Council pointed out in the undermentioned case,<sup>3</sup> "the difficulties of a litigant in India begin when he has obtained a decree" and that far too many obstacles are placed in the way of a decree-holder who seeks to execute his decree against the property of the judgment-debtor. It is also an important principle of law that rules of procedure are only handmaids of justice and ought not to be used for obstructing justice. It is accordingly the duty of the Court executing the decree to aid the decree-holder in realising the amount due under his decree, and it should therefore offer him all possible and reasonable facilities for realising the decretal amount in as short a time as possible.<sup>4</sup> As to simultaneous executions generally, see Note 10 to Section 38 and O. 21 Rr. 21 and 30.

Ordinarily there can be only *complete* execution<sup>4a</sup> but where it is ineffectual and *invalid*, another execution, valid in law, can be ordered.<sup>4b</sup> Thus, where a delivery of possession was made after an unconditional order of stay of execution had been passed by the Appellate Court, and consequently became ineffectual, the decree-holder can, after the dismissal of the appeal by the judgment-debtor, again apply for delivery of possession.<sup>5</sup>

#### Note 1a

1. ('36) AIR 1936 AH 495 (502); 58 AH 249 (FB).

#### Note 2

1. ('36) AIR 1936 Pat 46 (47).  
(26) AIR 1926 Lah 110 (110); 6 Lah 545. (Arrest for recovery of money.)

2. ('15) AIR 1915 Cal 186 (186).

2a. See Note 4 to O. 21 R. 30.

[See also ('35) AIR 1935 Pat 136 (131); 17 Pat 245.]

3. ('72) 17 Suth W R 459 (460) (PC).

4. ('36) AIR 1936 Cal 233 (233).

('36) AIR 1936 Pat 76 (77). (Court should not postpone or stay execution for unreasonably long time.)

4a. ('12) 16 Ind Cas 703 (703) (Cal).

('10) 8 Ind Cas 410 (411) (Oriss).

4b. ('21) AIR 1931 Pat 241 (247, 252) : 10 Pat 670 (FB).

5. ('12) 16 Ind Cas 703 (710) (Cal).



3. "By delivery of any property specifically decreed." — As to the mode of execution of a decree for specific moveable property, see O. 21 R. 31 and that for specific immovable property, see O. 21 Rr. 35 and 36. As to whether, in an order for delivery of any property decreed, the Court can grant an alternative relief by way of damages in default of such delivery, see Note 7 below.

4. "By attachment and sale or by sale without attachment of any property"—Clause (b). — Where the decree itself *directs the sale* of properties, as in the case of mortgage decrees, it is clear that no attachment is necessary for bringing the properties to sale in execution of that decree.<sup>1</sup> But, is an attachment an essential pre-requisite for the validity of sale of property in execution of a *money decree*? In order to answer this question it is necessary to read this Section, which enables a Court to order a sale without attachment, along with O. 21 R. 30, which provides that a money decree may be executed by *attachment and sale* of the judgment-debtor's property, and along with O. 21 R. 64, which provides that the Court may order that any property *attached by it shall be sold*. Under the old Code which contained no provision corresponding to the present Section, there was a conflict of opinion, one class of cases holding that the object of an attachment is to bring the property under the control of the Court with a view to prevent the judgment-debtor from alienating it, and that the absence of attachment is nothing more than an irregularity and does not *ipso facto vitiate* the sale;<sup>2</sup> and another class of cases holding that an attachment is an essential preliminary to sales in execution of simple decrees for money, and that the absence of attachment makes the *sale de facto* void.<sup>3</sup>

The present Section 51 now makes it clear that a sale without attachment is not *without jurisdiction* though in view of O. 21 Rr. 30 and 64 it may amount to an *irregularity*. This is the view taken by the High Courts of Lahore,<sup>3a</sup> Patna,<sup>4</sup> Madras<sup>5</sup> and Rangoon.<sup>6</sup> The High Court of Calcutta<sup>7</sup> has, on the other hand, held, relying on certain observations of their Lordships of the Privy Council in *Raja Thakur Barmha v. Jiban Ram Marwari*,<sup>8</sup> that a sale without attachment is *ipso facto* void. The High Court of Bombay also has held in an earlier decision that a property cannot be sold without attachment.<sup>9</sup> Neither of these decisions, however, adverted to Section 51, nor, it is submitted, does the decision in *Thakur Barmha's case* support the view taken by them.<sup>9a</sup> The said decisions cannot be accepted as sound. The purpose of attachment being to prevent a judgment-debtor from placing any obstacles in the way of the Court selling the property, it cannot be that the want of it will vitiate a sale *which has actually been effected without any such obstacles*. In a recent decision

#### Note 4

1. ('29) AIR 1929 Lah 90 (91) : 10 Lah 543.

('06) 33 Cal 676 (678).

('21) AIR 1921 Pat 320 (321). (Mortgage suit — Compromise decree not expressly providing for attachment—Attachment not necessary.)

2. ('99) 21 All 311 (313).

('67) 8 Suth W R 9 (10).

('91) 18 Cal 188 (192, 193).

('94) 21 Cal 639 (641).

('11) 9 Ind Cas 918 (922) (Cal). (Case under the old Code.)

('07) 30 Mad 255 (264). (Appointment of receiver means that property is under attachment.)

('13) 18 Ind Cas 498 (499) (Mad).

('99) 21 All 140 (141, 142).

[See also ('07) 34 Cal 811 (820, 821) (FB). (Notice under S. 10, Public Demands Recovery Act,

1895 is condition precedent — Plaintiff should recover possession saying sale has not affected his title.)]

3. ('83) 5 All 86 (91) (FB).

('88) 10 All 506 (510).

('85) 7 All 702 (706, 708).

('87) 9 All 136 (138).

('92) 16 Bom 91 (101).

3a. ('30) AIR 1930 Lah 685 (685, 686).

4. ('23) AIR 1923 Pat 45 (47, 48) : 2 Pat 207.

5. ('26) AIR 1926 Mad 211 (214, 215).

6. ('24) AIR 1924 Rang 124 (126) : 1 Rang 533.

7. ('18) AIR 1918 Cal 1036 (1037).

[But see ('27) AIR 1927 Cal 847 (847).]

8. ('13) 21 Ind Cas 936 (937) : 41 Cal 590 : 41 Ind App 38 (PC).

9. ('11) 12 Ind Cas 911 (912) : 36 Bom 156.

9a. ('26) AIR 1926 Mad 211 (214, 215).

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of the Bombay High Court<sup>9b</sup> that Court also has held, dissenting from its earlier decision, that a sale in execution without an attachment is *not* a nullity.

Section 51 clause (b) empowering the Court, in general terms, to attach and sell in execution *any property* must be interpreted to mean that the Court has jurisdiction to attach and sell in execution any property which the decree-holder puts forward as the property of his judgment-debtor.<sup>10</sup> If the property does not belong to the judgment-debtor but to a stranger, the latter will not be bound by the sale in any way.<sup>11</sup> But it is not void as between the decree-holder, judgment-debtor and the auction-purchaser,<sup>12</sup> and the purchaser can only apply under O. 21 R. 91 to set aside the sale on the ground that the judgment-debtor has no saleable interest in the property sold. The property to be sold must, however, be *saleable property* under Section 60 of the Code.<sup>13</sup> Thus, lands inalienable according to the provisions of special enactments such as Section 3 of the Bengal Regulation III of 1872,<sup>14</sup> or Section 1 of the Punjab Alienation of Land Act,<sup>15</sup> cannot be sold in execution.

There is a difference of opinion on the question whether the Court can, under this clause, order a temporary alienation of property in execution, such as by mortgaging or leasing it out for a term. There is also a conflict of opinion on the question whether, where a sale is prohibited under a special or local Act, the Court can, by way of execution, grant a mortgage or a lease of the judgment-debtor's property. On the first question it has been held by the High Court of Lahore that Section 72 implies that the Court has authority to order a temporary alienation of the judgment-debtor's property. It has also held that the power to transfer the entire bundle of rights constituting ownership by way of sale includes the lesser power of transferring some of those rights.<sup>16</sup> The High Court of Allahabad has, on the other hand, dissented from the Lahore view and has held that a power to sell does not include a power to grant a lease. As regards Section 72, it has held that that Section circumscribes the Court's powers as regards the granting of leases to the conditions prescribed by it.<sup>17</sup> The Peshawar Judicial Commissioner's Court has held that the Court has power, apart from the provisions of Section 72, to order a temporary alienation of the judgment-debtor's property.<sup>17a</sup> The Nagpur High Court has held that the Court has no *inherent* power to order temporary alienation, apart from the provisions of Section 72.<sup>17b</sup>

On the second question, the High Court of Lahore holds that the prohibition of sale does not prevent the Court from mortgaging or leasing the property under this clause and that the provisions of Section 72 do not affect the powers of the Court in this respect.<sup>18</sup> According to the High Court of Allahabad, as has been seen already, the power to grant a lease arises only under Section 72 which applies only when a sale has been ordered, so that, where no sale can be ordered by reason of statutory

9b. ('39) AIR 1939 Bom 277 (278) : 41 Bom L R 463 (468, 469).

10. ('27) AIR 1927 Mad 394 (394, 395) : 50 Mad 639. (It does not mean that the Court can sell properties which before the sale all parties knew did not belong to the judgment-debtor.)

[See also ('22) AIR 1922 Lah 147 (148). (Attachment of land belonging to gaddinashin and entered in the name of the shrine — Attempt to defeat execution by getting property mutated in the name of shrine—Attachment should be ordered as requested by decree-holder.)]

11. ('26) AIR 1926 Oudh 501 (502).

12. ('27) AIR 1927 Mad 394 (394, 395) : 50 Mad 639.

13. See Note 5, Section 60.

14. ('29) AIR 1929 Pat 700 (701) : 9 Pat 368 (FB).

15. ('20) AIR 1920 Lah 456 (459) : 1 Lah 192 (FB).

16. ('30) AIR 1930 Lah 77 (78).

('29) AIR 1929 Lah 195 (195).

('20) AIR 1920 Lah 456 (459) : 1 Lah 192 (FB).

('36) AIR 1936 Lah 696 (698).

17. ('38) AIR 1938 All 290 (291, 292) : 1 L R (1938) All 528 (FB). (AIR 1932 All 571 overruled. [See also ('37) AIR 1937 All 699 (700, 701).])

17a. ('36) AIR 1936 Pesh 90 (91).

('35) AIR 1935 Pesh 113 (114).

17b. ('37) AIR 1937 Nag 41 (42).

18. ('20) AIR 1920 Lah 456 (459) : 1 Lah 192 (FB).

[See also ('36) AIR 1936 Lah 30 (31).]

prohibition, the Court has no power to grant a lease at all.<sup>19</sup>

According to the Judicial Commissioner's Court of Peshawar, when a sale is prohibited, all powers, such as those of mortgaging or leasing the property which are derived from the power to sell are also taken away.<sup>20</sup>

The Nagpur High Court has held that the Court cannot order the attachment of property for the purpose of temporary alienation when such property is not liable to be sold in execution.<sup>20a</sup>

Where not only a sale but also a temporary alienation is prohibited, it is of course clear that the Court cannot, by way of execution, make an order for temporary alienation.<sup>21</sup>

The word "sale" in the Section includes not only a sale in court auction but also a sale by a nominee of the parties under a consent decree.<sup>22</sup>

The fact that immovable property is attached before judgment and the attachment is continued after the decree will not disable the decree-holder from applying for the attachment and sale of the moveable property of the judgment-debtor.<sup>23</sup>

**5. "By arrest and detention."** — Under O. 21 R. 30 a decree for the payment of money, including a decree for the payment of money as an alternative to some other relief, may be executed by the detention in the civil prison of the judgment-debtor. Under O. 21 R. 31 (1) a decree for specific *moveable* property may be similarly executed by the arrest and detention of the judgment-debtor. But there are some exceptions to this rule. Thus, a decree cannot be executed by arrest and detention where the judgment-debtor is a woman (Section 56) or a minor or legal representative of a deceased person (Sections 50 and 52).<sup>1</sup>

As has been seen in Note 2 above, it is for the judgment-creditor to decide in which of the several modes he will execute his decree. Where, therefore, a decree-holder prays for the arrest of the judgment-debtor the Court cannot (except as provided for by the proviso) compel the decree-holder to proceed against his property<sup>1a</sup> or to accept payment by instalments.<sup>2</sup>

See also Sections 55 to 59 and O. 21 Rr. 30, 31 (1) and 37 to 40 *infra* which contain further provisions on this mode of execution.

**5a. Proviso to the Section.** — The proviso to the Section was inserted in the Code by the Code of Civil Procedure Amendment Act of 1936 (21 of 1936), Section 2. The proviso restricts the power of the Court to arrest the judgment-debtor in execution of a money decree and lays down that except in certain specified cases, the judgment-debtor shall not be arrested in execution of such a decree. See the under-mentioned cases<sup>1</sup> decided with reference to the proviso.

19. ('38) AIR 1938 All 290 (291, 292) : I L R (1938) All 528 (FB).

('37) AIR 1937 All 699 (700, 701).

20. ('36) AIR 1936 Pesh 90 (90, 91).

[But see ('35) AIR 1935 Pesh 113 (114).]

20a. ('37) AIR 1937 Nag 41 (43).

21. ('29) AIR 1929 Pat 700 (701); 9 Pat 368 (FB).

22. ('17) AIR 1917 Cal 740 (742); 44 Cal 789.

23. ('36) AIR 1936 Bom 268 (272).

#### Note 5

1. ('22) AIR 1922 Nag 98 (100, 101); 18 Nag LR 145 (Judgment-debtor a woman.)

1a. ('39) 180 Ind Cas 767 (769) (Pat).

('37) AIR 1937 Oudh 379 (381) : 13 Luck 340.

('36) AIR 1936 Pesh 46 (47).

('35) AIR 1935 Cal 127 (129).

2. ('30) AIR 1930 Lah 220 (221).

#### Note 5a

1. ('39) 43 Cal W N 427 (429) (In the calculation of the means of the judgment-debtor for the purpose of S. 51 proviso, cl. (b), C. P. Code, the necessary expenses of maintaining the life of the debtor and of his dependants must be taken into account and deducted from his income.)

('39) AIR 1939 Lah 299 (299, 300). (Judgment-debtor being agriculturist, Court while determining question of his capacity to pay decretal amount cannot take into account his agricultural lands and residential houses.)

**6. "By appointing a receiver"—Clause (d).**—Execution by appointment of a receiver is known as *equitable execution*<sup>1</sup> and is entirely within the *discretion* of the Court.<sup>2</sup> It is thus an exception to the general rule stated in Note 2 above that it is for the *decree-holder* to choose the mode of execution and that the Court has no power to refuse to order execution in the mode asked for. This mode of execution was being adopted by Courts even under the old Code,<sup>3</sup> and this Section only gives legislative sanction to the exercise of such powers. The Section, however, does not confer a general power on the executing Court to appoint a receiver in every case. It merely prescribes a mode of execution of the decree by appointment of a receiver while the conditions and limitations under which such appointment is to be made are prescribed by O. 40 R. 1.<sup>3a</sup>

There is a difference of opinion as to whether a receiver may be appointed in respect of properties *which cannot be attached and sold*. According to the High Courts of Allahabad,<sup>3b</sup> Calcutta,<sup>4</sup> and Lahore<sup>4a</sup> and the Judicial Commissioners' Courts of Nagpur,<sup>5</sup> and Peshawar,<sup>5a</sup> such an appointment can be made, the Nagpur Court taking the view that the appointment of a receiver does not amount to attachment. The High Court of Patna has, on the other hand, held that such an appointment amounts to an *equitable attachment* and that therefore no such appointment can be made in respect of properties not liable to be attached and sold under Section 60.<sup>6</sup> The Allahabad High Court has held in a recent decision that where the law prohibits the *dispossession* of the judgment-debtor from certain property, a receiver cannot be appointed in respect of such property.<sup>6a</sup> No receiver can be appointed in respect of a *mere right to future*

('39) AIR 1939 Pat 22 (22). (The onus of proof is on the decree-holder to establish that the judgment-debtor had sufficient means to pay the debt within the meaning of sub-cl. (b) of the proviso.)

('38) AIR 1938 Cal 448 (449). (Fraudulent concealment or transfer of property—What amounts to, within the meaning of the proviso.)

('38) AIR 1938 Lah 692 (693). (Arrest is not possible unless there has been some contumacious conduct on the part of the judgment-debtor and mere inability to pay does not justify arrest.)

('38) AIR 1938 Pesh 17 (18). (Judgment-debtor after decree selling his property but neglecting to pay decretal amount is liable to be detained in civil prison.)

#### Note 6

1. ('39) AIR 1939 Oudh 116 (118).

('29) AIR 1929 Pat 700 (701) : 9 Pat 368 (FB). (Equitable execution is equitable attachment.)

('33) AIR 1933 All 227 (228). (Application by defendants.)

('30) AIR 1930 Mad 4 (9,10). (Receiver is an officer of the Court—Second defendant appointed.)

('32) AIR 1932 Cal 189 (192) : 59 Cal 205. (Such appointment to be deemed as one under O. 40 R.1.)

('30) AIR 1930 Cal 159 (159). (Affirmed in AIR 1931 P C 160.)

[See also ('24) AIR 1924 Nag 165 (166). (Appointment of a receiver is a mode of execution.)]

2. ('39) AIR 1939 Oudh 116 (118).

('36) AIR 1936 Bom 399 (400).

('13) 21 Ind Cas 283 (286, 287); 16 Oudh Cas 238. (Property unsaleable for rent and profits.)

('32) AIR 1932 Cal 189 (192); 59 Cal 205. (Decree-holder cannot ask for appointment as a right.)

('31) AIR 1931 Oudh 307 (308) : 7 Luck 203.

('32) AIR 1932 Mad 193 (195). (Third party in possession—Parties without present right cannot disturb him—Appointment when just and convenient.)

[See also ('33) AIR 1933 Sind 231 (232). (Defendant and property not under Court's jurisdiction and not a subject of suit or execution—Appointment refused.)]

3. ('87) 11 Bom 448 (455). (Under S. 503 of C. P. Code of 1882 to collect attached debt.)

3a. ('37) AIR 1937 All 389 (392, 393) : I L R (1937) All 542.

('37) AIR 1937 Lah 738 (739).

('37) AIR 1937 Oudh 232 (233).

3b. ('34) AIR 1934 All 605 (606). (Money decree against agriculturists in Bundelkhand.)

4. ('12) 14 Ind Cas 227 (228) : 39 Cal 1010. (Income of Ghatwali property is not itself Ghatwali property and is liable to be sold.)

('30) AIR 1930 Cal 159 (160). (Affirmed on appeal in AIR 1931 P C 1e0.)

4a. ('38) AIR 1938 Lah 458 (458).

5. ('15) AIR 1915 Nag 98 (99); 11 Nag L R 113. (Money decree in lieu of maintenance—Sir land.)

('33) AIR 1933 Nag 266 (267). (AIR 1925 P C 176, Foll.—Inam Jahagir—For share in the Jahagir property profits.)

5a. ('38) AIR 1938 Pesh 30 (31).

6. ('29) AIR 1929 Pat 700 (700, 701); 9 Pat 368 (FB). (Agricultural lands in Sonthal Parganas.)

6a. ('37) AIR 1937 All 389 (392, 393). (Land not transferable under Agra Tenancy Act.)

*maintenance* inasmuch as such a right is not *property* at all.<sup>7</sup> But where the maintenance is *charged on property* or is to *come out of specified properties*, it has been held by the Privy Council that a receiver may be appointed for realising the rents and profits of the properties and for applying them towards the maintenance of the debtor and the balance towards the discharge of the decree debt.<sup>8</sup>

A receiver may be appointed to realise a decree or debt which has been attached in execution proceedings,<sup>9</sup> or to collect the future rents and profits accruing due from attached properties,<sup>10</sup> or from the estate of a deceased debtor in the hands of his heirs,<sup>11</sup> or even in respect of property situate outside the Court's jurisdiction,<sup>11a</sup> or for realisation of property by prosecuting causes of action arising outside jurisdiction.<sup>12</sup>

Where a receiver has been appointed at the instance of one decree-holder, it is not necessary that every decree-holder should also have a receiver appointed in his own suit in respect of the same property,<sup>13</sup> though it does not disable him from asking for such relief in proper cases. Thus, a mortgagee decree-holder can ask for the appointment of a receiver though a receiver has already been appointed in a partition suit.<sup>14</sup>

**7. "In such other manner," etc.** — As to the other modes of execution than those specified in clauses (a) to (d), see the following —

*Section 54.* — Partition of estate or separation of share of such estate to be made by the Collector or any gazetted subordinate of the Collector.

*Sections 68 to 72.* — Execution of decrees against immovable property in certain cases to be transferred to the Collector.

*O. 21 R. 31 (2).* — Award of compensation to decree-holder for disobedience of decree to deliver specific moveable property.

*O. 21 R. 32.* — Enforcement of decree for specific performance, for restitution of conjugal rights or for an injunction.

*O. 21 R. 33.* — Special procedure for execution of a decree for restitution of conjugal rights.

7. (1893) 1 Q B 551 (558), *Holmes v. Millage*. (Moneys to become payable in consideration of services.)

[See also ('36) AIR 1936 Bom 399 (400). (Receiver cannot be appointed in respect of possible future earnings.)

('33) AIR 1933 Bom 350 (352); 57 Bom 507.]

8. ('25) AIR 1925 P C 176 (176); 47 All 385; 52 Ind App 262 (PC).

('15) AIR 1915 Nag 98 (99); 11 Nag L R 113. (Rents and profits in lieu of maintenance decree to be recovered from *sir lands*.)

('26) AIR 1926 Mad 565 (565); 49 Mad 567. (Recovery of stamp duty from pauper's future maintenance.)

('31) AIR 1931 P C 160 (161); 51 Ind App 215; 59 Cal 1 (PC). (Pension implies periodical payment of money by Government.)

[See also ('35) AIR 1935 Mad 1046 (1047). (Court can direct money collected by receiver in execution to be disbursed for benefit of judgment-debtor.)

('36) AIR 1936 Nag 288 (289); I L R (1937) Nag 534. (Service inam lands—Execution against judgment-debtor — Court can appoint receiver to collect income.)

('33) AIR 1933 Nag 266 (267). (Berar Inam Rules, R. 3—Jahagir granted under, for maintenance—Receiver can be appointed to manage jahagir—Suitable allowance to be fixed on amount coming into receiver's hands.)]

9. ('87) 11 Bom 448 (455).

('29) AIR 1929 Bom 279 (280). (Where a decree to be realised has been mortgaged to the plaintiff in the mortgage suit in which receiver is appointed.)

10. ('25) AIR 1925 Rang 318 (319, 320); 3 Rang 235. (Order allowing decree-holder to collect rent set aside—Receiver only can file suit for rent.)

11. ('19) AIR 1919 Oudh 326 (328); 22 Oudh L R 194. (Money decree.)

11a. ('38) AIR 1938 Lah 93 (94); I L R (1938) Lah 305. (Receiver can be appointed in respect of property in native State—But the receiver cannot be directed to take possession of such property—Proper order is to direct the plaintiff in possession to hand over possession to the receiver.)

('30) AIR 1930 Cal 502 (503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000).

12. ('21) AIR 1921 Mad 222 (223).

13. ('30) AIR 1930 Mad 441 (442).

14. ('11) 12 Ind Cas 265 (1911).

*O. 21 R. 34.* — Execution of decree for execution of a document or endorsement of a negotiable instrument.

*O. 21 R. 53.* — Attachment of decrees.

*O. 21 R. 56.* — Delivery of attached coins or currency notes to the party entitled under the decree.

This clause does not enable a Court to add to, or subtract from, the terms of the decree itself inasmuch as it is a general principle of law that an executing Court cannot go behind the decree but must execute it as it stands.<sup>1</sup> Thus, where a decree in a redemption suit directs delivery of title deeds without any alternative provision for payment of damages in default of doing so, the *executing Court* cannot award such damages, though a separate *suit* may lie therefor.<sup>2</sup>

As to adjustments or agreements of parties out of Court as to the mode of execution of the decree, see *O. 21 R. 2*.

**8. "On the application of the decree-holder."** — The Section requires that the Court can act only on the *application of the decree-holder*. The reason for this requirement is that it concerns the parties alone and that the Courts need execute their decrees only if the parties entitled thereto want it.<sup>1</sup> But the application need not necessarily be in writing; it may be *oral*.<sup>2</sup> Nor need the mode of execution be *specifically expressed* in such application; it may be inferred from the act of the Court executing the decree.<sup>3</sup> As regards the appointment of a receiver, it has been held by the High Court of Rangoon that even without an application, the Court can *suo motu* order the appointment of a receiver under Section 94 (d) and *O. 40 R. 1*.<sup>4</sup> This view is correct. The requirement as to the application in this Section is subject to the conditions and limitations prescribed by the rules—in this case *O. 40 R. 1*—under which the Court can act *suo motu*.

This Section requires that the application must be made by the decree-holder. A *stranger* to the suit or decree cannot apply for execution though there may be a benefit conferred on him by the decree.<sup>5</sup> Nor can the judgment-debtor apply under this Section, *e. g.*, for the appointment of a receiver.<sup>6</sup>

For definition of "decree-holder," *vide* Section 2 clause (3).

**9. Appeal.** — This Section must be read with *O. 40 R. 1*, and an order appointing a receiver in execution, if it falls under *O. 40 R. 1*, is appealable as an order under *O. 43 R. 1 (s)*.<sup>1</sup> But if the order of appointment is only a *conditional* one on the furnishing of security and security is not furnished, the order does not take effect at all and no appeal lies.<sup>2</sup> An order refusing to discharge a receiver is one relating to the

#### Note 7

1. See Note 8 under Section 38, *ante*.

2. ('22) AIR 1922 Mad 299 (300).

#### Note 8

1. ('20) AIR 1920 Lah 443 (446). (Court cannot appoint receiver unless asked.)

2. See *O. 21 R. 11 Cl. (2)*.

3. ('20) AIR 1920 Lah 443 (446).

4. ('25) AIR 1925 Rang 318 (320) : 3 Rang 235. (To collect rent in a money decree.)

5. ('17) AIR 1917 Oudh 182 (184, 185). (Compromise decree for allowances—Third person, though allowances fixed for him, not entitled to apply for execution.)

[See however ('32) AIR 1932 Mad 193 (194, 195). (Scheme suit—Board of control created

to call for accounts—Misappropriation and disobedience by trustee—Board of control deemed decree-holder entitled to ask for appointment of receiver.)]

6. ('22) AIR 1922 Pat 369 (371). (Right of decree-holder to sell mortgaged property cannot be defeated.)

[See however ('70) 13 Suth W R 453 (454). (Manager appointed under S. 243 of Act VIII of 1859.)]

#### Note 9

1. ('27) AIR 1927 Lah 190 (190).

('11) 12 Ind Cas 745 (751) (Cal).

('12) 14 Ind Cas 227 (228): 39 Cal 1010.

('20) AIR 1920 Lah 443 (444).

2. ('11) 12 Ind Cas 745 (751) (Cal).

"execution" of the decree within Section 47 and as such is appealable as a *decree*.<sup>3</sup> An order under this Section which does not fall within Section 47 or within O. 43 R. 1 is not appealable.<sup>4</sup>

**52.** [S. 252.] (1) Where a decree is passed<sup>4</sup> against a party<sup>5</sup> as the legal representative<sup>3</sup> of a deceased person, and the decree is for the payment of money<sup>12</sup> out of the property of the deceased,<sup>9</sup> it may be executed by the attachment and sale<sup>14</sup> of any such property.

(2) Where no such property remains in the possession of the judgment-debtor and he fails to satisfy the Court that he has duly applied such property of the deceased as is proved to have come into his possession, the decree may be executed against the judgment-debtor to the extent<sup>13</sup> of the property in respect of which he has failed so to satisfy the Court in the same manner as if the decree had been against him personally.

[1877, Ss. 252 and 234; 1859, Ss. 203 and 210. See O. 22, Rr. 4, 5 and 12.]

### Synopsis

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|--|---|
| 1. Legislative changes.  | 9. "Out of the property of the deceased."   |
| 2. Scope and object of the Section.  | 10. Property in the hands of a third party.   |
| 3. "Legal representative."   | 11. Insolvency of heirs after decree—Effect.  |
| 4. Decree against legal representative, when and how to be passed and its effect.  | 12. Decree for payment of money.  |
| 5. Decree against some of several legal representatives—Validity and legal effect. | 13. Liability of legal representative under the Section.  |
| 6. Decree against wrong legal representative—Effect.                               | 14. Manner of execution.  |
| 7. Decree against executor who has not proved the will—Effect.                     | 15. Right of legal representative to question the validity of the decree. See Section 50, Note 7. |
| 8. Decree against dead person—Effect.  | 16. Appeal.   |

### Other Topics (Miscellaneous)

"Attachment and sale," meaning of. See Note 14 Pt. (3).

Burden of proof. See Note 13 Pts. (2) and (3).

Due application, what is. See Note 13 Pts. (6) and (7).

Liability of legal representatives of a Hindu or Mahomedan.

See Note 5 F-N (1); see also Section 11 Note 63b.

Personal liability of legal representative. See Note 13 Pt. (4).

"Where no such property remains." See Note 13 Pt. (5).

**1. Legislative changes.** — The words "in respect of which he has failed so to satisfy the Court" have been substituted for the words "not duly applied by him" in clause (2) of the Section.

**2. Scope and object of the Section.** — This Section contemplates cases where the debtor dies before the decree and the decree itself has been passed against the

3. ('18) AIR 1918 Pat 60 (61).

4. ('29) AIR 1929 Rang 161 (161); 7 Rang-110.

when the suit is based on the allegation that the defendants are in possession of the assets.<sup>5</sup>

In an early decision of the Calcutta High Court, it was held that where there are several legal representatives of the deceased it is not necessary that their shares should be defined; it is enough if a joint decree is passed against all of them.<sup>6</sup> But it has been recently held by the Privy Council that in a suit against the heirs of a deceased Mahomedan for a dower debt due by the deceased, the proper form of decree is against each of the heirs of the deceased for that proportion of the plaintiff's joint claim which corresponds to the share of each heir in the estate of the deceased.<sup>6a</sup> The decree against a legal representative under this Section should direct the defendant to pay the decree debt *out of the assets* of the deceased in his hands.<sup>7</sup> A decree which does not make such a direction is an erroneous decree.<sup>8</sup>

The decree passed under this Section is a mere money decree and does not create a *charge* on the assets of the deceased. The Section only states the extent to which and the manner in which the debt can be recovered, and in no way provides for reservation of property to satisfy the debt.<sup>9</sup> Where a person is sued as a representative, a decree cannot be passed against him on the ground that he is a partner since it would alter the nature of the suit.<sup>10</sup>

In order that the provisions of this Section may apply, the decree must be against a *person* and not merely against something which is not a person. Thus, a decree merely against the assets of a deceased person without mentioning the name of the legal representative is inexecutable.<sup>11</sup>

Where a decree is passed against several heirs of a deceased person and the decree-holder realises the entire decretal amount from some of the heirs alone, the latter can sue the other heirs for contribution.<sup>12</sup>

**5. Decree against some of several legal representatives — Validity and legal effect.** — As has been already mentioned in Note 63b to Section 11, a decree obtained against some only of several heirs of a deceased person is binding on the estate<sup>1</sup> in the absence of fraud or collusion, on the principle of substantial

(72) 18 Suth W R 185 (188) (PC).

(73) 20 Suth W R 280 (282, 283).

(27) AIR 1927 All 459 (460); 49 All 645. (Per Mukerji, J.)

(73) 20 Suth W R 162 (162).

(78) 2 Cal L Rep 189 (191, 192).

(81) 1881 Pun Re No. 11, page 20.

(75) 1875 Pun Re No. 12, page 19.

(31) AIR 1931 Nag 173 (175); 27 Nag L R 247. (120 Ind Cas 333 (Nag) Foll.)

[But see (25) AIR 1925 Nag 380 (381). (Possession of assets may be enquired into either in suit or execution proceedings.)

(27) AIR 1927 All 459 (462); 49 All 645. (Per Ashworth J.)]

5. (70) 14 Suth W R 431 (432). (If possession not proved, suit must be dismissed.)

6. (71) 15 Suth W R 192 (192, 193).

6a. (38) AIR 1938 P C 80 (84); 65 Ind App 119; 32 Sind L R 362 (PC).

7. (08) 18 Mad L Jour 36 (36).

(96) 1896 Bom P J 226 (227).

(1863) Marsh 611.

(10) 6 Ind Cas 397 (397) (Mad).

(17) AIR 1917 Mad 418 (419).

(26) AIR 1926 Oudh 301 (303).

(31) AIR 1931 Sind 141 (143); 25 Sind L R 173.

(70) 2 N W P H O R 449 (450). (Costs also.)

8. (23) AIR 1923 Bom 414 (415). (Such decree can be amended even at a late stage.)

(74) 1874 Pun Re No. 65, page 213.

9. (16) AIR 1916 Mad 645 (645, 646). (Case under Provincial Insolvency Act (3 of 1910), S. 16(2).)

(83) 9 Cal 406 (409).

10. (09) 2 Ind Cas 146 (148); 34 Bom 244.

11. (34) AIR 1934 Mad 562 (563). (Phrase "out of the estate of the deceased" is merely restrictive—In this case it was held that amendment of the decree was the remedy.)

12. (38) AIR 1938 P C 169 (173, 174); 65 Ind App 219; 13 Luck 494 (PC).

#### Note 5

1. (05) 32 Cal 296 (313); 32 Ind App 23 (PC). (Mahomedan heirs.)

(82) 8 Cal 370 (373, 374). (Do.)

(83) 9 Cal 508 (510). (Do.)

(90) 14 Bom 597 (602, 603, 604). (Do.)

(79) 5 Cal L Rep 477 (480); 6 Ind App 233 (PC). (Do.)



representation.<sup>1a</sup> This principle will not, however, apply where all the heirs are impleaded and some of them are subsequently exempted by the plaintiffs from the array of defendants. In such a case the defendant exempted cannot be considered to have been represented by the other defendants.<sup>1b</sup> (See also Section 50 Note 14.) In the case of *co-administrators* or two or more *legatees*, it has been held that a decree against one only will not bind the estate.<sup>2</sup>

**6. Decree against wrong legal representative — Effect.** — Where a creditor selects from among several rival claimants to the estate of his deceased debtor any one whom he *bona fide* believes to have the best *prima facie* title as legal representative and obtains a decree against him, the decree and the consequent execution sale will bind the true heir in the absence of fraud or collusion.<sup>1</sup> This is an exception to the general principle of law that a decree will bind only the parties to it or those claiming through them. But the true legal representative cannot, after the decree, be brought on record *for the purpose of execution* and the deceased debtor's property *in his hands* cannot be attached and sold in that same suit.<sup>2</sup> If a person who has no sort of right to represent the deceased is made a party to the suit and a decree is obtained against him as representing the deceased, such decree cannot bind the true heir.<sup>3</sup> In such a case it cannot be said that the suit was a *bona fide* one.

('86) 11 Bom 361 (364, 365). (Do.)

[See ('89) 12 Mad 356 (365). (Some persons allowed to represent a community — Decree for injunction — No personal liability against persons not co-nominees on the record.)]

*In view of the Privy Council decision above referred to, the following cases relating to Mahomedan co-heirs cannot be considered to be good law:—*

('79) 4 Cal 142 (153, 155, 156).

('76) 2 Cal 395 (398).

('85) 7 All 822 (826, 845) (F B).

('70) 14 Suth W R 448 (449).

('01) 23 All 263 (264).

('95) 19 Bom 273 (275).

('75) 1 All 57 (59, 60) (F B).

('85) 7 All 716 (719).

('87) 14 Cal 464 (483).

('82) 11 Cal L Rep 268 (271, 272).

('23) AIR 1923 Bom 411 (411, 412): 47 Bom 712.

1a. ('03) 26 Mad 230 (234). (Mahomedan heirs.)

('28) AIR 1928 Mad 1199 (1199). (Do.)

('24) AIR 1924 Bom 420 (421). (Do.)

('87) 12 Bom 101 (103). (Do.)

('95) 20 Bom 338 (345). (Do.)

('89) 12 Mad 90 (91, 92). (Do.)

('94) 21 Cal 311 (317). (Do.)

('92) 20 Cal 453 (463). (Hindu heirs.)

('25) AIR 1925 All 479 (480): 47 All 466 (Do.)

1b. ('32) AIR 1932 All 591 (592, 593): 54 All 796.

[See also ('38) AIR 1938 P C 7 (8): 13 Luck 61: 32 Sind L R 221 (P C). (Suit against sons and grandsons of deceased Hindu — Suit dismissed against grandsons, decreed against sons — Decree cannot be executed against shares of grandsons in property.)]

2. ('17) AIR 1917 Pat 432 (432). (Co-administrators.)

('13) 18 Ind Cas 632 (632, 633) (Mad). (Decree against one only of two legatees.)

#### Note 6

1. ('33) AIR 1933 Lah 380 (381): 14 Lah 696.

('16) AIR 1916 Mad 1022 (1023, 1024).

('30) AIR 1930 Mad 930 (938): 54 Mad 212. (Binding on legatee also.)

('28) AIR 1928 Mad 243 (243, 245).

(1900) 24 Bom 135 (147, 148).

('72) 17 Suth W R 459 (461) (P C).

(1864) Marsh 614.

('85) 11 Cal 45 (49, 50, 51, 52). (Adopted son also is bound unless he shows some good cause.)

('89) 16 Cal 40 (56, 60, 61): 15 Ind App 195 (PC).

('79) 4 Cal 342 (344, 345, 346).

(1863) 1863 Suth W R Sup 119. (Campbell, J. Dissentient.)

('96) 23 Cal 374 (388, 389).

[See ('39) AIR 1939 Lah 277 (279): 41 Pun L R 147 (149). (Decree against widow as legal representative of deceased husband — Minor son not impleaded in suit is bound by decree.)]

[But see ('13) 18 Ind Cas 381 (382) (Bom). (Submitted wrongly decided.)]

2. ('09) 3 Ind Cas 737 (738): 33 Mad 75.

('32) AIR 1932 Lah 314 (315). (True representative cannot be substituted after period of limitation. See S. 22, Limitation Act.)

('27) AIR 1927 Mad 197 (198, 199).

('16) AIR 1916 Cal 661 (662). (Remedy of decree-holder is either to have decree vacated and proceed with true legal representative or to file a suit on the judgment against the true legal representative.)

('87) 14 Cal 316 (320).

('14) AIR 1914 Cal 28 (29).

3. ('80) 5 Bom 14 (19).

('34) AIR 1934 All 474 (477, 479). (Trespasser in possession — Decree against — Not binding on real heir.)

('33) AIR 1933 Mad 43 (46, 48). (Even in the absence of fraud.)

('69) 12 Suth W R F B 1 (4) (F B).

As regards the cases where the true heir is affected by estoppel the principle stated in Section 50 Note 14 applies here also. See also the undermentioned cases.<sup>4</sup>

**7. Decree against executor who has not proved the will — Effect.** — An executor appointed by will does not represent the deceased by virtue of the will until he has obtained probate. Therefore, a suit against him by the creditor is not maintainable unless the executor has intermeddled with the estate.<sup>1</sup> In order that the just claims of the creditor in such cases may not be defeated by the executor not taking out probate, the persons who take possession of the estate of the deceased will be treated as the representatives of the deceased. Even if the decree obtained against them cannot be executed against the estate in the hands of the executor when he has taken out probate, it is sufficient to enable the plaintiff to bring a suit against the executor in order to have the decree satisfied.<sup>2</sup>

**8. Decree against dead person—Effect.** — A suit against a dead person is not maintainable.<sup>1</sup> If a decree is obtained against a dead person without impleading the legal representative, the decree is a nullity and cannot be executed.<sup>2</sup> But the decree is not invalid if the defendant dies *after the conclusion* of the hearing but *before the pronouncing of the judgment*.<sup>3</sup> See O. 22 R. 6. So also a decree passed by the Privy Council against a respondent who dies pending the appeal is not a nullity.<sup>4</sup>

**9. "Out of the property of the deceased."** — A decree obtained against the legal representative of a deceased debtor can be executed only against the estate of the

('68) 14 Suth W R 448n (449n).

('82) 4 All 192 (194, 195). (Proper heir who obtained from District Court letters of administration under Indian Succession Act, is not affected by the decree against wrong heirs.)

('71) 8 Bom H C R A C 37 (39).

('85) 9 Bom 86 (91, 93).

('74) 8 Mad H C R 186 (188).

('11) 12 Ind Cas 915 (918, 919) : 34 All 79. (The succeeding person to estate as per Hindu law does not do so as a heir or legal representative but as survivor; hence cannot be said heir to his assets.)

('10) 5 Ind Cas 710 (711) (Cal) (Hindu widow—Decree against, after remarriage, does not bind the true legal representative of deceased husband.)

('14) AIR 1914 Cal 263 (267). (When defendant dies, plaintiff must choose under S. 368 against whom he is to proceed.)

('88) 11 Mad 408 (410, 411). (Submitted decision is correct though the reasoning is wrong.)

4. ('27) AIR 1927 Bom 181 (184) : 51 Bom 125. (On alleged representative's request his name as representative removed. He or persons claiming under him are estopped from further claiming.)

('71) 8 Bom H C R A C 37 (43). (Case of intermeddling.)

('85) 9 Bom 86 (91).

('16) AIR 1916 All 284 (285). (Once the plaintiff confines himself to decree for assets in hand, he cannot in execution claim the property which came in the hands of defendant thereafter.)

('79) 3 Cal L Rep 157 (157, 158).

('25) AIR 1925 Nag 380 (381). (Defendant's failure to deny oral pleading — Inference of admission cannot be drawn.)

#### Note 7

1. (1894) 1894 A C 437 (442), Mohamadu Mohideen Hadjiar v. Pitchay.

('12) 16 Ind Cas 690 (691) (Cal).

('94) 19 Bom 821 (827).

('09) 2 Ind Cas 818 (819) (Cal). (Order for probate not sufficient.)

2. ('03) 80 Cal 1044 (1057, 1058, 1059).

('79) 4 Cal 342 (345, 346).

('15) AIR 1915 Cal 207 (208).

('91) 14 Mad 454 (457). (4 Cal 342 followed.)

('08) 35 Cal 276 (279, 280). (Administrator—Executor de son tort.)

#### Note 8

1. ('08) 31 Mad 86 (88, 89).

('25) AIR 1925 Mad 1210 (1210) : 49 Mad 18 (F B). (But in the case of an appeal the defect can be rectified. Overruling AIR 1924 Mad 56.)

2. ('16) AIR 1916 Mad 656 (656) : 38 Mad 682.

('95) 17 All 478 (481, 482).

('79) 3 Cal L Rep 192 (193).

('13) 20 Ind Cas 506 (506) (Cal).

('68) 10 Suth W R 455 (456, 457).

('67) 7 Suth W R 52 (52).

('67) 1867 Pun Re No. 65.

('70) 1870 Pun Re No. 85.

('02) 4 Bom L Rep 340 (341).

('20) AIR 1920 Nag 61 (61, 62) : 16 Nag L R 138.

('70) 14 Suth W R 337 (338). (Principle applies to appellate decrees also.)

('02) 26 Bom 317 (319). (Do.)

3. ('95) 19 Bom 807 (809). (17 Bom 29 followed.)

('99) 21 All 314 (315, 316). (19 Cal 513 (PC) followed.)

('92) 19 Cal 513 (538) : 19 Ind App 108 (P O).

('03) 26 Mad 101 (102).

('97) 21 Bom 314 (317).

4. ('37) AIR 1937 Pat 321 (322) : 16 Pat 316.

latter in his hands.<sup>1</sup> The decree-holder is not entitled to proceed against his separate property.<sup>2</sup> As to cases of survivorship in Hindu joint families, see Section 53 Note 2. Where the survivor does not inherit as heir of the deceased but gets into the estate in his own *individual right*,<sup>2a</sup> or where lands are attached to a hereditary office and are inalienable, they have not the character of simple heritable property and do not form part of the assets of the deceased person.<sup>3</sup> But, where under a grant for maintenance, a grantee has a heritable but non-transferable interest in the property, it cannot be said that each successive heir has only a life-interest in the property. As the grant is heritable each heir derives his interest by inheritance and the property in his hands forms the assets of the deceased grantee.<sup>3a</sup>

Rents and profits of immovable property are legal incidents of such property and bear the same character as the property itself. So, where a decree is passed against

### Note 9

1. ('08) 18 Mad L Jour 36 (36, 37).
- ('27) AIR 1927 Bom 52 (52, 53). (Order 21 Rule 12 is not applicable in such cases.)
- ('31) AIR 1931 Bom 229 (231, 232). (Hindu law—Son is liable for his father's lawful debts only.)
- ('68) 10 Suth W R 199 (200).
- ('96) 1896 Bom P J 226.
- ('75) 23 Suth W R 265 (266).
- ('78) 2 Cal L Rep 189 (192).
- ('74) 22 Suth W R 388 (388). (The heirs of the deceased are also liable for the papers in custody for which the claim is established against the estate of the deceased.)
- ('74) 22 Suth W R 494 (495). (The heirs are also liable for damages arising out of breaches of contract made by the deceased.)
- ('84) 8 Bom 220 (223). (Although the property may not have come into the sons' possession.)
- (1865) 2 Suth W R 258 (258).
- ('74) 1874 Pun Re No. 65, p. 213.
- ('05) 1905 Pun LR No. 48, p. 185. (A got a decree for possession of lands against X but died before getting possession—X himself, legal representative of A and hence merger of titles—Held lands liable in the hands of X for decree against A.)
- ('29) AIR 1929 Lah 424 (425).
- ('24) AIR 1924 Nag 410 (411) : 21 Nag L R 12. (Son's sons are liable after their separation from grandfather for his debts to the extent of assets.)
- ('87) 11 Bom 528 (532, 533). (Widow's arrears of maintenance are her assets for the cause of debt incurred by her.)
- ('25) AIR 1925 Nag 380 (381). (Can be executed against property obtained even after the decree.)
- ('16) AIR 1916 All 284 (286). (Do.)
2. ('17) AIR 1917 Pat 536 (537).
- ('25) AIR 1925 Oudh 113 (113) : 27 Oudh Cas 234. (Even though passed as a personal decree not executable.)
- ('21) 65 Ind Cas 224 (224) (Pat). (Do.)
- ('76) 25 Suth W R 224 (224). (Judgment-debtor must prove and file the whole inventory of the whole estate descended to him before he can claim exemption on ground that he only received a small asset.)
- ('78) 3 Mad 42 (46).
- ('69) 12 Suth W R 233 (233, 234).
- ('70) 14 Suth W R 362 (362). (Before executing the decree against the heirs personally for the deceased person's assets decree-holder must prove that they have not duly applied the same and that no such property of the deceased can be found as he can sell in execution.)
- ('72) 18 Suth W R 185 (188) (P C).
- ('73) 20 Suth W R 280 (282, 283).
- ('06) 1906 Pun Re No. 123, p. 466.
- (1864) 1864 Suth W R Misc 1 (2). (Even though he be a Hindu son.)
- ('71) 8 Bom H C R A C 245 (248, 249).
- ('31) AIR 1931 All 368 (369). (Widow's maintenance amount after surrender of husband's estate is not liable to a decree against husband's estate.)
- ('97) 4 Cal W N 151 (152). (Where property is seized decree-holder must prove that it belongs to deceased and is not the private property of legal representative.)
- ('88) 1888 All W N 49 (50). (Do.)
- 2a. ('14) AIR 1914 Oudh 208 (208). (Zamindar is not a legal representative of the deceased tenant who leaves no heir and whose estate escheates to zamindar.)
- ('70) 5 Mad H C R 303 (309). (An unsettled Polliam in Madras presidency.)
- ('87) 10 Mad 117 (121). (Malabar Tarwad karnavan.)
3. ('80) 5 Cal 389 (412, 419). (Ghatwalli lands.)
- (1865) 4 Suth W R Misc 5 (6). (Do.)
- ('66) 6 Suth W R 129 (129). (Do.)
- ('67) 7 Suth W R 178 (178, 179). (Do.)
- ('96) 23 Cal 873 (876). (Do.)
- ('82) 9 Cal 187 (206, 208) : 9 Ind App 104 (PC). (Do.)
- ('82) 9 Cal 388 (388). (Do.)
- ('88) 15 Cal 471 (481, 482) : 15 Ind App 18 (PC). (Do.)
- ('84) 10 Cal 677 (684, 685). (Do.)
- ('85) 9 Bom 198 (212, 217, 232) (F B). (Vatan lands.)
- ('25) AIR 1925 Nag 449 (450). (Balance of sale proceeds from occupancy field of the deceased father's estate is not asset in the hands of the son—Money representing such property is also not liable.)
- ('06) 1906 Pun Re No. 123, p. 466.
- ('20) AIR 1920 Pat 468 (468). (But rent income accrued during deceased's lifetime though collected subsequently will be assets.)
- 3a. ('36) AIR 1936 Oudh 76 (79).

the assets of a deceased person in the hands of his heir, the rents and profits accruing since his death form part of his assets.<sup>4</sup> But in the case of lands attached to a hereditary office and which are inalienable, the income is not liable to attachment under this Section.<sup>5</sup> A right to a share of offerings in a temple which has been inherited by a person forms part of the assets of the deceased for the purpose of this Section.<sup>5a</sup>

Where a decree is passed against the assets of the deceased in the hands of the representative and the representative himself dies thereafter, the property in the hands of his heir or legal representative does not cease to be assets of the deceased debtor.<sup>6</sup>

**10. Property in the hands of a third party.**—When a person is sued as the legal representative of a deceased person for the recovery of a debt due by the deceased, and a decree is passed for money to be paid out of the assets of the deceased in the hands of the representative, the decree is nonetheless a decree against the legal representative. It refers to him as the judgment-debtor, and it follows that such a decree can be executed only against the representative who was made a defendant in the suit or his or her representatives.<sup>1</sup> As has been already mentioned in Section 50, Note 15, a judgment-creditor cannot in execution of his decree follow the assets of the deceased in the hands of transferees in good faith and for valuable consideration,<sup>2</sup> unless the transfers are affected by the doctrine of *lis pendens*<sup>3</sup> or the transferees knew that there were unpaid debts and that the transferor did not intend to apply the sale proceeds to pay them.<sup>4</sup> Even in such a contingency, the transfer not being a void

4. ('38) AIR 1938 Oudh 45 (45) : 13 Luck 689.

(Overruling AIR 1914 Oudh 233.)

('36) AIR 1936 Lah 236 (236).

('24) AIR 1924 Mad 530 (532, 533, 536, 537) : 47 Mad 411 (F B).

('82) 137 Ind Cas 632 (633) (Oudh.)

('32) AIR 1932 Lah 383 (383).

('17) AIR 1917 Mad 536 (537).

('28) AIR 1928 Oudh 40 (40) : 2 Luck 403.

('21) AIR 1921 Sind 29 (32, 33) : 15 Sind L R 47.

(Income or crops during lifetime of judgment-debtor liable, even though crops not liable as inalienable under Dekkhan Agriculturists Relief Act but not income or crops raised by successor after death of previous holder.)

('04) 8 Cal W N 843 (850, 852). (Accretions.)

('71) 15 Suth W R 285 (285, 286).

[But see ('97) 19 All 235 (236, 237). (Submitted wrongly decided.)]

5. (1865) 4 Suth W R Misc 5 (6). (Ghatwalli lands.)

('66) 6 Suth W R 129 (129). (Do.)

('67) 7 Suth W R 178 (178, 179). (Do.)

('96) 23 Cal 873 (876). (Do.)

('23) AIR 1923 All 169 (169, 170). (Inalienable property.)

('24) AIR 1924 Mad 707 (707). (Impartible estates.)

('13) 21 Ind Cas 272 (273) : 9 Nag L R 137. (Where Government rayat's holding is inalienable under Section 67E of the Central Provinces Land Revenue Act, 1881.)

('16) AIR 1916 Lah 313 (314). (Punjab Colonisation of Government Lands Act (5 of 1912) — Government tenant.)

('70) 5 Mad H C R 303 (310). (Unsettled Pollem

and revenue and income therefrom are not liable in hands of successor.)

('30) AIR 1930 Bom 238 (239). (Section 22, clause (2) Dekkhan Agriculturists Relief Act—Collector cannot be appointed to manage lands of deceased judgment-debtor in the hands of legal representative.)

5a. ('36) AIR 1936 All 131 (134) : 58 All 457.

6. ('14) AIR 1914 Mad 668 (669).

(1900) 22 All 367 (369, 370).

[See also ('88) 1938 Nag L Jour 176 (179).]

#### Note 10

1. ('09) 3 Ind Cas 737 (738) : 33 Mad 75.

('30) AIR 1930 Cal 762 (763) : 58 Cal 170. (The right of a creditor to follow the assets in the hands of a legatee is a right which has to be exercised by a suit only.)

[See ('84) 10 Cal 860 (864) : 11 Ind App 59 (P C).]

2. (1863) Mar 509, Campbell v. Delaney.

(1865) 2 Suth W R 296 (297).

('69) 12 Suth W R 177 (178). (Obiter.)

('71) 14 Suth W R 239 (241, 244, 245, 246).

(Mahomedan widow's dower is on par with other debts. — A purchaser from the deceased Mahomedan is not bound to enquire into the existence of legal necessity.)

('81) 8 Cal L Rep 447 (448).

('80) 7 Cal L Rep 460 (462, 463).

('75) 3 Ind App 241 (245) (P C).

('79) 4 Cal 402 (403) : 5 Ind App 211 (P C).

('72) 9 Bom H C R 116 (119).

('97) 19 All 504 (505, 506.)

('69) 10 Suth W R 199 (201).

3. ('79) 4 Cal 402 (410) : 5 Ind App 211 (P C).

4. ('79) 4 Cal 897 (912, 914)

Whenever a decree is passed against the heir, it must be deemed to be executable only as provided in this Section, though the decree is erroneously passed as a personal decree.<sup>1a</sup>

It is for the decree-holder to prove in the first instance, that some assets belonging to the estate of the deceased came into the hands of the legal representative<sup>3a</sup> and then it is for the latter to satisfy the Court as to the extent of the assets received and to account for them.<sup>4</sup> He will be bound to account for all sorts of property that he got, such as money, moveables, immovables, accounts, papers, etc.<sup>3a</sup> If the defendant fails to satisfy the Court that he has duly applied the property of the deceased, he is personally liable to the extent of the property of which he has failed to satisfy the Court.<sup>4</sup> But sub-section (2) will apply only when no

- 1a. ('75) 24 Suth W R 383 (384).  
 ('21) 65 Ind Cas 224 (224) (Pat).  
 2. ('17) AIR 1917 Mad 536 (538). (Legal representative failing to satisfy the Court that he had personally liable.)  
 ('24) AIR 1924 Mad 466 (467, 469). (No proof of assets—Not liable.)  
 ('66) 3 Mad H C R 161 (164).  
 ('72) 18 Suth W R 185 (188) (P C).  
 ('76) 25 Suth W R 224 (224, 225).  
 ('68) 10 Suth W R 199 (200, 201).  
 ('67) 8 Suth W R 160 (161).  
 ('67) 8 Suth W R 198 (196).  
 ('70) 14 Suth W R 362 (362). (The decree-holder must satisfy the Court that no such property of the deceased can be found as can be sold in execution before he can execute the decree against heirs to the extent of property they inherited from the debtor.)  
 ('69) 12 Suth W R 238 (234).  
 ('96) 1896 Bom P J 226.  
 ('78) 3 Mad 42 (46).  
 ('14) AIR 1914 All 280 (281).  
 ('90) 4 Cal W N 151 (152).  
 2 Ind fur (NS) 234. (Brother taking possession, widow having relinquished—Liable as legal representative.)  
 ('73) 21 Suth W R 117 (118). (Son instead of objecting asked time for payment—Interference is should explain delay in proceeding against assets.)  
 ('78) 20 Suth W R 422 (424). (Decree-holder should explain delay in proceeding against assets.)  
 [But see ('86) 1888 All W N 49 (50).]

3. ('39) 181 Ind Cas 721 (725) (Pat).  
 ('37) AIR 1937 Rang 531 (538). (Question to be decided by executing Court and not in regular suit.)  
 ('17) AIR 1917 Mad 536 (538).  
 ('38) AIR 1938 Rang 309 (310).  
 ('38) AIR 1938 Rang 447 (447).  
 ('34) AIR 1934 Rang 93 (94).  
 ('11) 12 Ind Cas 253 (255) (Mad).  
 ('24) AIR 1924 Mad 466 (468).  
 ('76) 25 Suth W R 224 (224). (Before judgment-debtors can claim exemption from decree-holder's claim on ground that they have received a small asset from ancestor's estate or otherwise, they should prove and file the whole inventory of it.)

- (67) 8 Suth W R 195 (196).  
 ('68) 3 Mad H C R 161 (164).  
 ('71) 15 Suth W R 285 (285, 286).  
 ('65) 2 Suth W R 238 (238).  
 ('69) 12 Suth W R 233 (234).  
 ('15) AIR 1915 Cal 646 (646). (Legal representative's liability for intermeddling with minor's estate.)  
 ('86) 1888 All W N 49 (50).  
 ('57) 1887 Pun H C No. 87 p. 187.  
 ('73) 20 Suth W R 250 (252).  
 ('03) 26 Mad 501 (501, 502).  
 ('90) 1890 Bom P J 166 (166).  
 ('27) AIR 1927 Rang 127 (127); 5 Rang 44. (This question should be decided in execution under S. 47 and not by a regular suit.)  
 ('70) 14 Suth W R 181 (182). (But if question of possession of assets was raised and decided in suit itself, it cannot be agitated again in execution.)  
 3a. ('74) 22 Suth W R 388 (388, 389).  
 4. ('39) 181 Ind Cas 721 (725) (Pat). (Section 52 (2) of the Civil Procedure Code simply enacts a rule of procedure in accordance with natural justice, and even in the absence of that Section (and of any provision of law to the contrary) Courts would have been justified in applying the principle embodied in it as a rule of justice, equity and good conscience.)  
 ('38) AIR 1938 Mad 684 (686).  
 ('17) AIR 1917 Mad 536 (538).  
 ('33) AIR 1933 Rang 309 (310). (Question can be gone into in execution itself: AIR 1927 Rang 127 P.H.).  
 ('30) AIR 1930 Lab 204 (204).  
 ('69) 12 Suth W R 617 (617).  
 ('68) 10 Suth W R 199 (200).  
 ('78) 1 Cal L Rep 359 (360, 361).  
 ('30) AIR 1930 Lab 332 (333). (Lapse of time does not absolve judgment-debtor but may affect proof as to due application.)  
 ('96) 1896 Bom P J 226. (This question to be decided only in execution and not in suit.)  
 ('97) 20 Mad 446 (447). (Personal decree can be passed in suit.)  
 ('22) AIR 1922 Oudh 200 (200). (A person who without any right took possession of the property and disposed of a portion of it is liable for personal decree against him for the deceased person's debts.)